87-1412

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUSAN E. DAVIDSON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal From The Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a state court rule permitting mid-trial appeals of evidentiary rulings by the State in criminal cases after jeopardy has attached and over a defendant's objection, followed by a second trial of the same defendant for the same offense, is repugnant to the double jeopardy clause.

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No.

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SUSAN E. DAVIDSON,
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PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal From The Supreme Court of Illinois

JURISDICTIONAL STATEMENT

INTRODUCTION

Susan Davidson, Appellant, appeals from the final judgment of the Supreme Court of Illinois entered December 22, 1987, letting stand the lower court's denials of her double jeopardy claim. This jurisdictional statement is submitted to demonstrate that the United States Supreme Court has jurisdiction of the case on appeal, or alternatively by way of certiorari, and that a substantial federal constitutional question is presented.

OPINIONS BELOW

After jeopardy attached at trial, the State was granted a mistrial over Appellant's objection to seek appellate review of

adverse evidentiary rulings[1] under an Illinois court rule[2] which permits such mid-trial appeals. The Appellate Court vacated the trial court's ruling as "untimely" and remanded the case for a new trial.[3] The Illinois Supreme Court denied leave to appeal.[4]

On remand, the trial court denied Appellant's motion[5] to dismiss the case on grounds of former jeopardy and upheld the validity of the court rule as against Appellant's challenge that the rule was repugnant to the Fifth Amendment.[6] The Appellate Court dismissed Appellant's appeal[7] and the Illinois Supreme Court denied leave to appeal[8] and Appellants motion for reconsideration of that denial.[9] The Illinois Supreme Court also denied Appellant's request that it certify it had considered and decided a federal constitutional question.[10] Notice of appeal to the United States Supreme Court was filed May 1, 1984, in the Office of the Illinois Supreme Court Clerk.[11]

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[1] *People v. Davidson* (1983), Appendix 1, page A1.

[2] *Illinois Revised Statutes,* Chapter 110A, Section 604(a)(1), Appendix 12F, page A32.

[3] *People v. Davidson* (1983), Appendix 1, page A1.

[4] Appendix 2, page A13.

[5] Appendix 3, page A14.

[6] Appendix 4, page A17.

[7] Appendix 5, page A18.

[8] Appendix 6, page A21.

[9] Appendix 7, page A22.

[10] Appendix 7, page A22.

[11] Appendix 8, page A23.

The United States Supreme Court dismissed the appeal on October 1, 1984.[12] Thereafter, appellant was tried by an Illinois circuit court, convicted of murder, and sentenced to thirty years imprisonment on March 25, 1985.[13] The Illinois Appellate Court affirmed the conviction on September 9, 1987,[14] specifically holding that the Illinois Supreme Court Rule permitting mid-trial appeals by the State was constitutional. The Illinois Supreme Court denied appellant's petition for leave to appeal on December 22, 1987.[15] Notice of Appeal to the United States Supreme Court was filed on the 18th day of February, 1988, in the office of the Illinois Supreme Court Clerk.[16]

JURISDICTION

This action is one in which the Appellate Court of Illinois on September 9, 1987,[17] specifically upheld the constitutionality of an Illinois Supreme Court Rule[18] as against challenges that the rule violated Fifth Amendment prohibitions against double jeopardy.[19] The Illinois Supreme Court on December 22, 1987,[20] denied petition for leave to appeal, and on the 18th day of February, 1988, Appellant filed notice of appeal[21] to the United States Supreme Court in the Office of the Illinois Supreme Court Clerk.

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[12] Appendix 13, page A36.

[13] Appendix 14, page A37.

[14] Appendix 15, page A38.

[15] Appendix 16, page A63.

[16] Appendix 17, page A64.

[17] *People v. Davidson* (1987), Appendix 15, page A38.

[18] Appendix 12F, page A32.

[19] Appendix 3, page A14.

[20] Appendix 16, page A63.

[21] Appendix 17, page A64.

Jurisdiction of the United States Supreme Court on appeal, or alternatively by way of certiorari, is conferred by the following authorities, the pertinent text of which constitutional provisions, statutes, and cases, is set forth in appendices 1-17.

1. This appeal falls within the obligatory jurisdiction of the United States Supreme Court.

28 *United States Code,* Sections 1257(2) and 2106.

2. Alternatively, the United States Supreme Court may grant a writ of certiorari to consider the question presented by this case.

28 *United States Code,* Section 1257(3).

3. A state court rule is a statute for purposes of appeal under 28 *United States Code,* Section 1257(2).

Mayer v. Chicago (1971) 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372.

In re Griffiths (1973) 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910.

Lathrop v. Donohue (1961) 367 U.S. 820, 81 S.Ct. 1826.

4. There is no adequate and independent state ground to support the state judgment because federal and state double jeopardy guarantees are construed alike.

People v. Grod (1944) 385 Ill. 584, 53 N.E.2d 591, 595.

5. The Fifth Amendment double jeopardy guarantee is enforceable against the states through the Fourteenth Amendment.

Benton v. Maryland (1969) 395 U.S. 784, 89 S.Ct. 2056, 2062.

6. The state court's judgment in this case is final on the federal question and is not subject to further review in the state courts, and is therefor appealable under 28 *United States Code,* Section 1257(2).

Cox Broadcasting Corp. v. Cohn (1975) 420 U.S. 469, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 328.

People v. Davidson (1987) ____ Ill.App.3d ____, 514 N.E. 2d 17, 112 Ill.Dec. 621, Appendix 15, page A38; Order of Illinois Supreme Court, Appendix 16, page A63.

7. This appeal is from the final judgment of the highest court of a state within the meaning of 28 *United States Code,* Section 1257(2) and (3).

Harris v. Washington (1971) 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212.

8. A federal constitutional question was specifically raised and decided.

Motion to dismiss, Appendix 3, Pages A15-18.

Order of the trial court, Appendix 4, Page A17.

Partial report of proceedings, motion to dismiss in trial court, Appendix 9, Page A25.

People v. Davidson (1987) ____ Ill.App.3d ____, 514 N.E. 2d 17, 112 Ill.Dec. 621

9. If the judgment of a lower court is subject under state law to discretionary review by a higher court, such review must be sought.

Minneapolis, St. P. and S. S. M. Ry. Co. v. Rock (1929) 279 U.S. 410, 49 S.Ct. 363.

Virginian Ry. Co. v. Muellens (1926) 271 U.S. 220, 46 S.Ct. 526.

10. If the state's highest court declines to review a case, the lower court's judgment becomes that of the highest court in which decision could be had.

Minneapolis, St. P. and S. S. M. Ry. Co. v. Rocky, supra.

Virginia Ry. Co. v. Mullens, supra.

11. The time for filing an appeal or a petition for certiorari runs from the date of the higher court's refusal to review.

American Railway Express Co. v. Levee (1923) 263 U.S. 19, 20-21, 44 S.Ct. 11.

12. The failure of the state's highest court to expressly rule upon a federal constitutional challenge to a state statute is equivalent to a finding of its validity within the meaning of 28 *United States Code,* Section 1257(2).

Lawrence v. State Tax Commissioner (1932) 286 U.S. 276, 52 S.Ct. 556.

Largent v. Texas (1943) 318 U.S. 418, 63 S.Ct. 667.

13. The fact that the highest court of a state in a second appeal refuses to consider the federal issues decided in a first appeal does not deprive the United States Supreme Court of jurisdiction to review the second judgment.

Reece v. Georgia (1955) 350 U.S. 85, 76 S.Ct. 167.

Urie v. Thompson (1949) 337 U.S. 163, 69 S.Ct. 1018.

Great Western Tel. Co. v. Burnham (1896) 162 U.S. 339, 16 S.Ct. 850.

14. A substantial question of federal constitutional law is raised in this case.

United States v. Martin Linen Supply (1977) 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642.

15. Illinois Supreme Court Rule 604(a)(1) is repugnant to the Fifth Amendment to the *Constitution of the United States.*

Constitution of the United States, Amendments 5 and 14.

Illinois Revised Statutes, Chapter 110A, Section 604(a)(1).

People v. Flatt (1980) 82 Ill.2d 250, 45 Ill. Dec. 158, 412 N.E.2d 509.

United States v. Martin Linen Supply, supra.

United States v. DiFrancesco (1980) 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328.

It is requested that this jurisdictional statement alternatively be deemed a petition for writ of certiorari pursuant to Title 28, *United States Code,* Section 1257(3) to the extent such may be necessary to confer jurisdiction of this case upon the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 *United States Code,* Section 1257(2).

28 *United States Code,* Section 1257(3).

28 *United States Code,* Section 2106.

Constitution of the United States, Amendments 5 and 14.

Illinois Revised Statutes, Chapter 110A, Section 604(a)(1).

Illinois Revised Statutes, Chapter 110A, Section 604(f).

Illinois Revised Statutes, Chapter 110A, Section 315.

Illinois Revised Statutes, Chapter 38, Section 114-12.

The pertinent text of these constitutional and statutory provisions is set forth in appendices 12A - 12I.

STATEMENT OF THE CASE

After jeopardy had attached at Appellant's criminal trial,[22] on February 18, 1982, the State, over Appellant's objection,[23] sought and obtained a mistrial based on the authority of Illinois Supreme Court Rule 604(a)(1)[24] to enable it to seek appellate review of certain adverse evidentiary rulings. These rulings barred testimony against Appellant by her lawyer's secretary on grounds of attorney-client privilege and foreclosed the introduction of prejudicial handwriting exemplars obtained for comparison against documents seized from her attorneys safe deposit box.[25]

The State asserted on appeal that Appellant could be retried following appellate review without violating the double jeopardy clause because the mistrial was caused by Appellant's "untimely" mid-trial "motion to suppress".[26] At the earliest possible time Appellant raised the federal constitutional question as crucial by contesting the reviewing court's jurisdiction in the appeal,[27] arguing in effect that the state court rule could not be applied to Appellant consistent with considerations of double jeopardy.[28]

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[22] The mistrial here occurred after the jury had been impaneled and some testimony had been received. *People v. Davidson* (1983), Appendix 1, page A1. Jeopardy attaches when the jury is impaneled and sworn, and this integral part of the constitutional double jeopardy guarantee is applicable to the states. *Crist v. Bretz* (1978) 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24.

[23] Appendix 10, page A29.

[24] Appendix 12F, page A32.

[25] *People v. Davidson* (1983), Appendix 1, page A1.

[26] *People v. Davidson* (1983), Appendix 1, page A1.

[27] *United States v. Martin Linen Supply* (1977) 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642.

[28] Appendix 11, page A30.

On July 8, 1983, the state appellate court vacated the trial court's evidentiary rulings as untimely and stated that since the mistrial was in its view triggered by Appellant's untimely motion to suppress, Appellant could be tried again notwithstanding double jeopardy considerations.[29] Appellant's petition for leave to appeal this adverse decision to the Illinois Supreme Court was denied on October 4, 1983.[30]

Following remand to the trial court and faced with the actuality of an imminent second trial, Appellant filed a motion to dismiss[31] the case on grounds that the earlier mistrial was a constitutionally impermissible termination of the trial because Illinois Supreme Court Rule 604(a)(1) was repugnant to the Fifth Amendment to the United States Constitution, as being violative of double jeopardy and the right to a trial before a particular tribunal.[32]

The trial court on January 20, 1984, denied Appellant's motion to dismiss and expressly upheld the validity of the court rule as against Appellant's constitutional challenge.[33]

Prior to her second trial, Appellant sought review of the denial of her double jeopardy and jury trial claim,[34] but on February 9, 1984, the appeal was dismissed based on the supposed *res judicata* effect of the appellate court's earlier deci-

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[29] *People v. Davidson* (1983), Appendix 1, page A1.

[30] Appendix 2, page A13.

[31] Appendix 3, page A14.

[32] Appendix 9, page A25.

[33] Appendix 4, page A17.

[34] This appeal was pursuant to *Illinois Revised Statutes*, Chapter 110A, Section 604(f), Appendices 12G, page A33 and 12H, page A33.

sion[35] as the law of the case.[36] The Illinois Supreme Court on April 3, 1984, denied Appellant's application for leave to appeal.[37] Notice of appeal to the United States Supreme Court was filed on May 1, 1984, in the Office of the Clerk of the Illinois Supreme Court.[37]

The United States Supreme Court dismissed the appeal on October 1, 1984.[38] Thereafter, appellant was tried by an Illinois circuit court, convicted of murder, and sentenced to thirty years imprisonment on March 25, 1985.[39] The Illinois Appellate Court affirmed the conviction on September 9, 1987,[40] specifically holding that the Illinois Supreme Court Rule permitting mid-trial appeals by the State was constitutional. The Illinois Supreme Court denied appellant's petition for leave to appeal on December 22, 1987.[41] Notice of Appeal to the United States Supreme Court was filed on the 18th day of February, 1988, in the office of the Illinois Supreme Court Clerk.[42]

THE QUESTION IS SUBSTANTIAL

This appeal raises the serious and substantial question of the constitutionality of a state court rule[43] which permits Appellant and all defendants in Illinois criminal cases to be tried more than once for the same offense.[44]

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[35] *People v. Davidson* (1983), Appendix 1, page A1.

[36] Appendix 5, page A18.

[37] Appendix 6, page A21.

[38] Appendix 13 page A36.

[39] Appendix 14 page A37.

[40] Appendix 15 page A38.

[41] Appendix 16 page A63.

[42] Appendix 17 page A64.

[43] Appendix 12F, page A32.

[44] See *People v. Flatt* (1980) 82 Ill. 2d 250, 45 Ill.Dec. 158, 412 N.E.2d 509; *People v. Davidson* (1987), Appendix 15, page A38.

The Illinois court rule here at issue is an eccentricity. No jurisdiction other than Illinois has been found which permits mid-trial appeal of evidentiary rulings by the State in criminal cases after jeopardy has attached and over a defendant's objection and then permits re-trial of the same defendant for the same charge before a second tribunal.

The Fifth Amendment prohibits placing a person twice in jeopardy for the same offense. The states are bound by this prohibition. *Benton v. Maryland* (1969) 395 U.S. 784, 89 S.Ct. 2056, 2062. Jeopardy attaches when the jury is impaneled and sworn, *Crist v. Bretz* (1978), at 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed. 2d 24.

Consistent with the Fifth Amendment the government may not appeal adverse rulings after jeopardy has attached where to do so would necessitate another trial or further fact finding proceedings, *United States v. Martin Linen Supply* (1977) 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642; *Finch v. United States* (1977) 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048; *Green v. United States* (1957) 355 U.S. 184, 78 S.Ct. 221, since such would violate double jeopardy and the defendant's "valued right to have his trial completed by a particular tribunal." *Arizona v. Washington* (1978) 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717, quoting from *Wade v. Hunter* (1949) 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed.2d 974; *United States v. DiFrancesco* (1980) 449 U.S. 117, 101 S.Ct. 426, 433, 66 L.Ed.2d 328. The Illinois rule is in conflict with these authorities.

The Illinois rule goes far beyond the federal rule which permits government appeal after jeopardy has attached only from a judgment *non obstante verdicto, United States v. Wilson* (1975) 420 U.S. 332, 337, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232, or from the sentence imposed, *United States v. DiFrancesco, supra.* These appeals are consistent with the double jeopardy clause because neither requires another trial or further fact finding proceedings. *United States v. Martin Linen Supply, supra;*

Finch v. United States, supra; Green v. United States, supra. "The double jeopardy focus . . . is not on the appeal, but on the relief that is requested, . . ." *United States v. DiFrancesco, supra,* at 101 S.Ct. 435. The only relief available to the State follwing successful mid-trial appeal in Illinois is a new trial and further fact finding before a different tribunal, specifically prohibited by these constitutional authorities.

Following a successful appeal by the State under Rule 604(a)(1), Illinois permits a defendant to be placed on trial for a second time before a different jury for the same offense,[45] which has been held not to violate a defendant's right not to be twice placed in jeopardy for the same offense.[46] The Illinois rule is an effort to attack the supposed unfairness to the State of the double jeopardy clause, which prohibits appeal of acquittals by the prosecution even if brought about by erroneous rulings of the trial court. *United States v. Jorn* (1971) 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543; *Fong Foo v. United States* (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629.

It is respectfully submitted however that there is no constitutional difference under the double jeopardy clause between permitting the State to appeal following verdicts of acquittal, which is constitutionally prohibited, *Fong Foo v. United States, supra; United States v. Martin Linen Supply, supra; Green v. United States, supra; Sanabria v. United States* (1978) 437 U.S. 53, 98 S.Ct. 2170, 2178, 57 L.Ed.2d 43, and in permitting the State in all criminal cases to appeal mid-trial after jeopardy has attached under Illinois Supreme Court Rule 604(a)(1 by certifying, in ef-

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[45] The language in *People v. Flatt, supra,* and *People v. Davidson* (1983), Appendix 1, page A1 remanding "for a continuation of the trial" following successful government appeals actually translates in practice to remand for a completely new trial and further fact finding before a different tribunal, see Appendix 121, page A33.

[46] *People v. Flatt, supra; People v. Davidson* (1987), Appendix 15, page A38.

fect, that an acquittal is imminent, *People v. Rogers* (1984) 123 Ill.App.3d 780, 79 Ill. Dec. 73, 78, 463 N.E.2d 211, *Green v. United States, supra,* at 78 S.Ct. 224, as occurred in the instant case.

The Illinois Rule is in conflict with a long line of rulings of this court. *United States v. Perez* (1824) 9 Wheat. 579; *Illinois v. Sommerville* (1973) 410 U.S. 458, 461-63, 93 S.Ct. 1066, 35 L.Ed.2d 425; and *United States v. DiFrancesco, supra,* at 449 U.S. 130. In cases where the trial is terminated without the defendant's consent, as here, the government must establish that the termination was occasioned by "manifest necessity" in order to avoid the double jeopardy bar to retrial. Illinois instead permits mistrial at the sole and unreviewable discretion of the prosecutor and completely removes this discretion from the trial judge.[47] This does not comport with the constitutional requirement that the trial judge himself determine whether "manifest necessity" requires a termination of trial. *Wade v. Hunter, supra; Arizona v. Washington* (1978) 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717; *Downum v. United States* (1963) 372 U.S. 735, 83 S.Ct. 1033.

Appellant's trial was terminated over her specific objection.[48] There was no determination by the trial judge that mistrial was required by "manifest necessity." Mistrial was declared merely to enable the State to appeal adverse evidentiary rulings. The decision to cause the mistrial was solely that of the prosecutor. While actual defense misconduct may in the proper circumstance require mistrial due to "manifest necessity," *Arizona v. Washington, supra,* "no precedent has yet suggested that where (a) defendant merely makes a proper . . . trial objec-

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[47] *People v. Flatt, supra, People v. Davidson* (1987), Appendix 15, page A38. *People v. Rogers, supra; People v. Johnson* (1983) 113 Ill.App.3d 367, 69 Ill. Dec. 285, 447 N.E.2d 502.

[48] Appendix 10, page A29.

tion, the defendant has deliberately elected to forgo his right to have his guilt or innocence determined by the first trier of fact." *People v. Rogers, supra,* at 79 Ill.Dec. 78. The state Appellate Court created such a precedent when it determined that Appellant's trial objections were "untimely" and therefore the underlying cause of the mistrial,[49] and her retrial therefore permissible.

Even within the State of Illinois, the other Appellate Court districts have applied a different definition as to what constitutes a "suppression" of evidence subject to mid-trial appeal by the state, than the definition applied to appellant's case by Illinois' Fifth District. The rule generally applied in Illinois to defendants in criminal cases holds that traditional, constitutionally-based motions to suppress should be filed before trial. If such motions are filed after trial begins, the court may properly consider them, but the state may appeal adverse rulings. *People v. Johnson* (1983) 113 Ill. App. 3d 367, 69 Ill. Dec. 285, 447 N.E. 2d 502; *People v. Rogers* (1984) 123 Ill. App. 3d 780, 79 Ill. Dec. 73, 463 N.E. 2d 211; *People v. Bradley* (1984) 129 Ill. App. 3d 177, 84 Ill. Dec. 520, 472 N.E. 2d 480; *People v. Benda,* (1984) 124 Ill. App. 3d 950, 80 Ill. Dec. 285, 464 N.E. 2d 1268; *People v. Dorsey* (1984) 129 Ill. App. 3d 128, 84 Ill. Dec. 351, 472 N.E. 2d 101. The rule applied to the appellant alone holds that any objection to evidence raised by defendant after trial begins that is based in whole or in part on public policy against encouraging illegal State conduct, as distinguished from concerns of reliability or relevance, is untimely, is improperly considered by the trial court and a mistrial granted over defense objection to permit the State to appeal an adverse ruling on such an objection is attributable to "defendant's conduct which necessitated the mistrial," so the defendant may again be placed on trial for the same offense. *People v. Davidson* (1983) 116 Ill. App. 3d 164, 71 Ill. Dec. 824, 451 N.E. 2d 978; *People v. Davidson* (1987) ____ Ill. App. 3d ____, 112 Ill. Dec. 621, 514 N.E. 2d 17.

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[49] *People v. Davidson* (1987), Appendix 15, page A38.

The issue presented by this appeal is of paramount and substantial importance to the citizens of Illinois and those of every state, since the destruction of the double jeopardy rights of one person or of the citizens of one state is to put in jeopardy those same rights of all citizens of every state. If permitted to stand, the Illinois rule may be reasonably expected to generate further state and federal efforts to erode the constitutional guarantee against being twice placed in jeopardy for the same offense.

The Supreme Court of the United States has not previously considered the validity or effect of such a far reaching rule. If the cited established precedents of this court do not resolve the question presented, it is respectfully suggested that plenary consideration with briefs on the merits and oral argument will assist the Court in such resolution.

CONCLUSION

For these reasons Appellant respectfully prays this Honorable United States Supreme Court note probable jurisdiction of this appeal, or, in the alternative, that a writ of certiorari be granted and this cause be set down for full briefing and oral argument on the merits and this issue of the constitutionality of *Illinois Revised Statutes,* Chapter 110A, Section 604(a)(1), be resolved.

Respectfully submitted,

Donald E. Groshong
601 East Third Street
Alton, IL 62002
(618) 462-1077

Attorney for Appellant

Admitted to the Bar of the Supreme Court of the United States on November 14, 1983

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States of America, hereby certifies that a true and correct copy of the above, foregoing and attached Jurisdictional Statement was duly served upon the attorney of record of all parties to the above entitled cause required to be served, by enclosing the same in an envelope duly addressed to such attorney at his business address as disclosed by the pleadings of record herein, with first class postage fully prepaid, and by depositing said envelope into a United States Post Office mailbox located in Alton, State of Illinois, on the 20th day of February, A.D., 1988.

SUSAN E. DAVIDSON, Appellant

By: DONALD E. GROSHONG
601 East Third Street
Alton, IL 62002
(618) 462-1077

Attorney for Appellant

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

AFFIDAVIT

Donald E. Groshong, being first duly sworn according to law, on oath deposes and says that he has read the above, foregoing and attached Certificate of Service and that he is familiar with the contents thereof and the matters contained therein, and that they are true and correct to the best of his knowledge and belief.

Donald E. Groshong, Affiant

SUBSCRIBED and SWORN to before me this 20th day of February, 1988.

Nancy L. Seigrist

Notary Public

My Commission Expires: 8-1-89

APPENDIX

APPENDIX 1

APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT
No. 82-125

(1983)

People of the State of Illinois
Plaintiff-Appellant,

vs.

Susan Davidson,
Defendant-Appellee.

HARRISON, Presiding Justice:

This is an interlocutory appeal by the People from two orders which the circuit court of Madison County entered during trial. The People raise three issues for review: first, whether the trial court was without authority after trial had commenced to rule on motions raising issues collateral to a determination of the defendant's guilt or innocence; second, whether the trial court violated principles of collateral estoppel in barring testimony by a state's witness; and third, whether the trial court's orders were substantively erroneous. The defendant's brief raises the additional issue of whether this court has jurisdiction over the instant appeal which, she contends, is from midtrial evidentiary rulings unappealable under Supreme Court rule 604(a). For the reasons which follow we vacate the orders of the circuit court and remand for a continuation of the trial.

The defendant was charged by information with the offenses of murder under an accountability theory, solicitation, and conspiracy. The charges stemmed from the murder of the defendant's husband on October 31, 1979. Letters purporting to have been written by the defendant to her alleged paramour and co-conspirator, William Gill, were discovered by the prosecution and obtained pursuant to a search warrant. The circuit court subsequently ordered the defendant to execute handwriting exemplars for comparison with the letters. Monica

Westbrook an employee at the same law firm which employed the defendant as a secretary, allegedly overheard an inculpatory conversation at the law firm's office between the defendant and a lawyer with the firm. A motion to suppress both the letters and Westbrook's testimony contended that the items were procured as a result of an illegal search and seizure. A hearing on this motion was held and arguments heard before Judge Matoesian who denied the motion on May 5, 1981. Judge Matoesian thereafter recused himself from the case, after the defense filed a motion for substitution. After the jury had been impaneled and some testimony received, the defendant orally moved to exclude the handwriting exemplars from evidence on the grounds that compelling the defendant to write verbatim excerpts from some of the letters violated the defendant's fifth amendment rights and that the copied statements were inflammatory and therefore prejudicial. The defendant also moved to exclude Westbrook's testimony on the basis of an asserted attorney-client privilege. The trial court orally allowed both motions. The State moved for a mistrial so that an interlocutory appeal could be taken from the orders. This motion was also allowed by the trial court. The prosecutor subsequently filed a certificate of substantial impairment.

The people first challenge the authority of the trial court to rule on the defendant's oral motions after trial had begun. This issue is interrelated with the defendant's question of our jurisdiction to hear this appeal and the two issues will be discussed together. The State's right to appeal from midtrial orders was explained by the supreme court in *People v. Flatt* (1980), 82 Ill.2d 250, 45 Ill.Dec. 158, 412 N.E.2d 509. The supreme court there noted that a defendant's right to file motions to suppress after trial has commenced is limited by section 114-12 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1981, ch. 38, par. 114-12). (82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509). Under this statute, the trial court has discretion to entertain a motion to suppress even though made during trial, providing the motion alleges that the evidence was illegally

seized. (82 Ill.2d 250, 262, 45 Ill.Dec. 158, 412 N.E.2d 509).) The States, right to appeal from orders granting such motions is governed by Supreme Court Rule 604 which provides in relevant part that "[i]n criminal cases the State may appeal only from an order or judgment the substantive effect of which results in * * * suppressing evidence." (87 Ill.2d R. 604(a)(1).) The *Flatt* court reasoned that because

> "the right of a defendant to file motions to suppress after the trial has commenced is limited by the provisions of section 114-12(c), the State's right to appeal from suppression orders during trial is limited to orders entered allowing these motions. However, some review must be given the prosecution of orders entered granting motions to suppress not authorized under section 114-12(c) which should have been made prior to trial. If the reveiwing court determines that the motion was not within the ambit of section 114-12(c) and that the court wrongfully considered it during the trial, the State must be permitted a review of the authority of the court to enter the suppression order, even if it did not involve illegally seized evidence and section 114-12(c) of the Code of Criminal Procedure of 1963. The review would not, in such a case, be on the merits of the court's ruling but rather would concern the trial court's authority to entertain the motion." 82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509.

The first step in analyzing the instant case is to determine whether the State may seek appellate review of the trial court's rulings. Whether a ruling which operated to prevent the admission of evidence is reviewable in the appellate court is determined solely by the prosecutor's certificate of substantial impairment. (82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509, see *People v. Tomasello* (1981), 98 Ill.App.3d 588, 597, 54 Ill.Dec. 35, 424 N.E.2d 785.) This conclusion is bolstered by the supreme court's holding in *People v. Young,* (1980), 82 Ill.2d 234, 45 Ill.Dec. 150, 412 N.E.2d 501. The court there stated that

> "Rule 604(a)(1) allows an interlocutory appeal by the State of a pretrial suppression order *whenever the prosecutor certifies to the trial court that the suppression substantially impairs the State's ability to prosecute the case.* Our intention in requiring this certification is not to formulate a standard by which courts may determine the appealability of a particular order. As this court noted in *[People v.] Van De Rostyne* [(1976) 63 Ill.2d 364, 349 N.E.2d 16], that would indeed by a heavy burden, one which we do not believe justified by the marginal diminution in the number of appeals which we anticipate such a procedure would produce. *Instead we rely solely upon the good-faith evaluation by the prosecutor of the impact of the suppression order on his case." (People v. Young* (1980), 82 Ill.2d 234, 247, 45 Ill.Dec. 150, 412 N.E.2d 501 (emphasis added).)

While *Young* applied this rule to pretrial orders, *Flatt* expressly adopted the rule in connection with midtrial rulings. "The right of such review however, does not extend to rulings which do not more than exclude evidence made during trial but must be limited to rulings which substantially impair the State's ability to prosecute the case *as shown by the certificate of the prosecutor* following the rationale of our holding in *People v. Young* (1980), 82 Ill.2d 234 [Ill.Dec. 150, 412 N.E.2d 501]." (*People v. Flatt* (1980), 82 Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509.) We distinguish here "reviewability" from "appealability"; the former is a limited concept confined to the narrow issue of the State's right to seek appellate evaluation of the trial court's authority to entertain the defendant's motion (See 82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509), while the latter is the ultimate conclusion under Rule 604(a). The prosecutor in the case *sub judice* filed a certificate of substantial impairment and we hold that we therefore must determine whether the trial court had the authority under section 114-12 to consider the defendant's motions.

The defendant has cited the recent appellate court case of *People v. Johnson* (1983), 113 Ill.App.3d 367, 69 Ill.Dec. 285, 447 N.E.2d 502, as authority for a contrary position. In *Johnson* the defendant moved during trial to preclude the State from introducing testimony relating to the defendant's allegedly false exculpatory statement. The trial court allowed the motion and the State obtained a mistrial for the purpose of maintaining an interlocutory appeal. In determining whether the State could appeal from the trial court's order, the appellate court in *Johnson* stated that "Supreme Court Rule 604(a)(1) permits the State to bring an appeal from an order 'the substantive effect effect of which results in * * * suppressing evidence.' (87 Ill.2d R. 604(a)(1).) Stated differently, the issue before this court is whether the trial court's ruling was, in fact, an order 'suppressing evidence' as that term is used in Supreme Court Rule 604." *(People v. Johnson* (1983), 113 Ill.App.3d 367, 370, 69 Ill.Dec. 285, 447 N.E.2d 502.) The court then reviewed the supreme court's opinions in *Young* and *Flatt* and discussed the problems entailed in defining a suppression order. The court determined that various public policies, including that of judicial economy, militate against interlocutory appeals. The court concluded that

> "a midtrial order 'suppressing evidence,' as that term is used in Supreme Court Rule 604(a)(1), is one in which the evidence is suppressed and denied admittance because it was illegally obtained in violation of a constitutional or statutory right, or even though lawfully obtained, its admittance is to be denied because of a statutory prohibition or the violation of a court rule or some other grounds besides the recognized rules concerning the admission of evidence." (*People v. Johnson* (1983), 113 Ill.App.3d 367, 373-374, 69 Ill.Dec. 285, 447 N.E.2d 502.)

A broader rule, noted the court, would cause grave disruption of criminal trial proceedings and would violate defendant's constitutional rights to due process and fair trial." (113 Ill.App.3d 367, 374, 69 Ill.Dec. 285, 447 N.E.2d 502.) The court then

analyzed the trial court's order and determined that it was an evidentiary ruling rather than a suppression order. The court dismissed the appeal and ordered the defendant freed on double jeopardy grounds. While we do not disagree with the court's analysis in determining whether the trial court's ruling was "evidentiary," we cannot agree that it is that analysis which governs the reviewability of the trial court's order in the first instance. As indicated above, the supreme court has extended appellate review under Rule 604(a)(1) "to rulings which substantially impair the State's ability to prosecute the case as shown by the certificate of the prosecutor following the rationale of our holding in *People v. Young* (1980), 82 Ill.2d 250, 264 [45 Ill.Dec. 150, 412 N.E.2d 501]." *People v. Flatt* (1980), 82 Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509.) The supreme court has thus read Rule 604(a)(1) more broadly than the literal interpretation of the *Johnson* decision. Moreover, the concern for public policy which underlies the *Johnson* opinion has already been explored by the supreme court in both *Young* and *Flatt*. The supreme court in *Flatt* balanced the concerns expressed by the *Johnson* court against the countervailing policy considerations arising from the unavailability of review from judgments of acquittal and the unfairness of weakening the State's case by the erroneous entry of suppression orders during trial *(People v. Flatt* (1980), 82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509), and concluded that appellate review should extend to midtrial rulings which the prosecutor determines to be a substantial impairment to his case (82 Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509). Consequently, we believe that the supreme court has already struck the balance between competing public interests and we, as an intermediate court of review, are not in a position to reexamine that policy determination. Accordingly, we decline to follow the mechanics of the decision in *People v. Johnson,* and will proceed to an analysis of the trial court's authority to entertain the defendant's motions.

Under *Flatt,* whether an order "suppresses" or "excludes" evidence determines whether the underlying motion was within

section 114-12 and, concomitantly, whether the trial court had the authority to rule on the merits of the motion. (82 Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509.) Although we have already held that the prosecutor's certificate controls the limited question of the reviewability of the trial court's order, that certificate is not dispositive of whether the defendant's motion was a motion to "suppress" *within section 114-12,* nor is the defendant's designation of the motion controlling. (See *People v. Flatt* (1980), 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) We believe that the determination of whether the trial court "suppressed" evidence was left to the reviewing court by the decision in *Flatt.* The supreme court there stated that *"where the reviewing court has determined* that the trial court entertained and allowed a motion to suppress that is not authorized by section 114-12(c)" the order should be vacated and the cause remanded. (82 Ill.2d 250, 265, 45 Ill.Dec. 158, 412 N.E.2d 509. See also *People v. Tomasello* (1981), 98 Ill.App.3d 588, 598, 54 Ill.Dec. 35, 424 N.E.2d 785.) The court in *Flatt* looked to the "gist of the motion" in deciding whether the motion sought suppression of evidence. (82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) In *People v. Phipps* (1980), 83 Ill.2d 87, 46 Ill.Dec. 164, 413 N.E.2d 1277, the supreme court indicated that a court of review should consider whether the "substantive effect, rather than simple [the] form, of the trial court's order * * * does operate to prevent evidence from being admitted." 83 Ill.2d 87, 90-91, 46 Ill.Dec. 164, 413 N.E.2d 1277.

The standard governing the classification of an order by the reviewing court as "excluding" or "suppressing" evidence under section 114-12 has proven elusive. In *Flatt,* the supreme court refereed to "an issue collateral to the determination of defendant's guilt or innocence" as the basis for a motion to suppress. (82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) The appellate court, in a pre-*Flatt* case, discussed this concept in greater detail.

> "In general that rule has referred to the suppression of evidence, which although probative, has been obtained in

> violation of the constitutional privilege of the accused against self-incrimination [citation] or his right to be free from unreasonable searches and seizures [citation]. The purpose of the exclusion is not to aid in the truth-seeking process but to deter future deprivations of individuals' rights by similar attempts to improperly obtain evidence." *(People v. Jackson* (1969), 67 Ill.App.3d 24, 27, 23 Ill.Dec. 797, 384 N.E.2d 591.)

The court concluded that the order, which refused admission of evidence because its prejudicial effect outweighted its probative value, was evidentiary in nature rather than suppressive. (See also *People v. Macaluso* (1976), 36 Ill.App.3d 592, 344 N.E.2d 476.) Similarly, the court in *People v. Johnson* (1983), 113 Ill.App.3d 367, 69 Ill.Dec. 285, 447 N.E.2d 502, held that an order based on lack of relevance "excluded" evidence.[1] The appellate court has also held that an order which was based on the prosecution's failure to establish a chain of custody in the handling of a document "excluded" evidence. *(People v. Williams* (1982), 108 Ill.App.3d 219, 220, 63 Ill.Dec. 948, 438 N.E.2d 1311.) Conversely, the court in *People v. Tomasello* (1981) 98 Ill.App.3d 588, 54 Ill.Dec. 35, 424 N.E.2d 785 held that an order which struck a witness' testimony because of a violation of a statute prohibiting the State from paying an investigator a fee contingent on the success of the prosecution was suppressive in nature. In *People v. Stuckey* (1979), 78 Ill.App.3d 1085, 1090, 34 Ill.Dec. 422, 398 N.E.2d 97, the trial court's order precluding identification testimony because of alleged police misconduct in failing to produce photographs was held to be a suppression ruling. In *Flatt,* the supreme court held that testimony concerning fingerprint evidence gleaned from a

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[1] While we disagree with the *Johnson* court's method of determining appealability, we are in harmony with that court's exposition and application of the rule differentiating "suppression" from "exclusion" of evidence. See 113 Ill.App.3d 367, 373-374, 69 Ill.Dec. 285, 447 N.E.2d 502.

pane of glass not produced by the prosecution had been "suppressed" by the trial court. In *People v. Phipps* (1980), 83 Ill.2d 87, 46 Ill.Dec. 164, 413 N.E.2d 1277, the court held that an order prohibiting the State from calling any witness who invoked a statutory privilege was suppressive. The court in *People v. Meyers* (1982), 109 Ill.App.3d 862, 865, 65 Ill.Dec. 484, 441 N.E.2d 397, held that the trial court's refusal to admit evidence obtained in violation of the accused's sixth amendment right to counsel was an order "suppressing" evidence. The rule which thus emerges from the cases is that a motion based on criteria relating to the perceived truthfulness, reliability, or relevance of the proffered evidence "excludes" evidence and section 114-12(c) does not preclude the trial court from ruling on such a motion; a motion which is based on public policies forbidding the use of certain evidence despite its relevance and apparent trustworthiness "suppress" evidence and section 114-12(c) prohibits the trial court from considering such a motion during trial absent an allegation of illegal seizure. See *People v. Flatt* (1980), 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.

The defendant argues strenuously that her motions were not motions to "suppress" but rather only ones seeking to "exclude" evidence and therefore were appropriately made during trial under section 114-12(c). The defendant further argues that because the motions were not motions to suppress, the trial court's orders are substantively unappealable under Supreme Court Rule 604(a), and the appeal must therefore be dismissed. (See *People v. Macaluso* (1976), 36 Ill.App.3d 592, 344 N.E.2d 476.) While we agree that dismissal of the appeal would be the proper remedy under Rule 604(a) were we to decide that the trial court "excluded" evidence, the record does not support defendant's interpretation of the trial court's orders.

The trial court's first ruling occurred after the jury had been sworn and impaneled and after at least one witness had testified. Before the prosecution called its expert witness to testify to his comparison of the handwriting sample, the defense sought to

preclude the prosecution from introducing the handwriting exemplars. Though two bases for the defense position were presented to the trial court, the record reflects that the court predicated its ruling on a fifth amendment ground. After hearing arguments of counsel the trial court sought clarification of the defendant's motion.

> "The Court: If they are told what to write, then you are saying that could be of a magnitude that violates the Fifth Amendment[?]
>
> [Defense Counsel]: Absolutely."

After further argument the trial court sustained the objection. The substantive effect of the trial court's ruling was to preclude the admission not only of the exemplars but also of the prosecution's entire expert testimony. The basis for the ruling was a perceived implication of the defendant's fifth amendment privilege against self-incirmination (see generally Annot., 43 A.L.R.3d 653 (1972)). That doctrine involves allegations of illegal State conduct and the public policy against encouraging such acts rather than an evaluation of reliability or relevance. *(Cf. People v. Flatt* (1980), 82 Ill.2d 250, 256, 45 Ill.Dec. 158, 412 N.E.2d 509; *People v. Jackson* (1979), 67 Ill.App.3d 24, 27, 23 Ill.Dec. 797, 384 N.E.2d 591; *People v. Macaluso* (1976), 36 Ill.App.3d 592, 594, 344 N.E.2d 476.) Accordingly, the issue was collateral to a determination of the defendant's guilt or innocence and was therefore a motion to suppress. *(People v. Flatt* (1980), 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) The order is therefore appealable under Rule 604(a) and we need not dismiss the appeal. For the same reason, the motion should have been made before trial; because it was not, and no allegation of illegal seizure was made, the motion was untimely under section 114-12(c) and the trial court should not have considered it. *(People v. Flatt* (1980), 82 Ill.2d 250, 265-266, 45 Ill.Dec. 158, 412 N.E.2d 509.) We accordingly vacate the order.

The second ruling at issue arose from the defendant's motion "to exclude Miss Westbrook's testimony based on the attorney-

client privilege * * *." Westbrook's counsel indicated to the court that Westbrook would not testify unless the court rules that the testimony was not barred by the attorney-client privilege. The trial court ruled that it "would honor the attorney-client privilege as to the testimony of Monica Westbrook." Like the fifth amendment exclusionary rule, the attorney-client privilege operates to preclude the admission of evidence on a basis of public policy rather than an evaluation of accuracy, relevance, or credibility. *Cf. People v. Flatt* (1980), 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509; *People v. Jackson* (1979), 67 Ill.App.3d 24, 27, 23 Ill.Dec. 797, 384 N.E.2d 591; *People v. Macaluso* (1976), 36 Ill.App.3d 592, 594, 344 N.E.2d 476.) We therefore conclude that the trial court "suppressed" Westbrook's testimony. This conclusion is bolstered by the supreme court's decision in *People v. Phipps* (1980), 83 Ill.2d 87, 46 Ill.Dec. 164, 413 N.E.2d 1277, where the court determined that an order strikingly similar to the one now under consideration had "suppressed" evidence.

> "This court's order states that no testimony will be permitted to be taken from the witnesses unless the witnesses take the affirmative act of waiving their privilege and turn over the files and report to the defense. Hence, as presently constituted, the trial court would proceed without these witnesses unless some further acts were performed. Evidence is thus being 'suppressed' at the moment." (83 Ill.2d 87, 91, 46 Ill.Dec. , 413 N.E.2d 1277.)

We therefore hold that the order suppressed Westbrook's testimony and consequently was untimely. The trial court was therefore without authority to consider it. *(People v. Flatt* (1980), 82 Ill.2d 250, 265-266, 45 Ill.Dec. 158, 412 N.E.2d 509.) Accordingly, the order is vacated.

In view of the result reached, we need not consider the State's other assertions of error, although a brief comment on the double jeopardy aspect of this case is appropriate. Because the

mistrial was triggered by the defendant's untimely motions to suppress, she may be tried without violating the proscription against double jeopardy. (See *People v. Flatt* (1980), 82 Ill.2d 250, 265, 45 Ill.Dec. 158, 412 N.E.2d 509.) Accordingly, the cause is remanded to the circuit court of Madison County for a continuation of the trial.

Vacated and remanded.

KASSERMAN and KARNS, JJ., concur.

APPENDIX 2

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Illinois 62706
(217) 782-2035

October 4, 1983

Mr. Donald E. Groshong
Groshong, Moorman & Fahrenkamp
227 W. St. Louis Avenue
East Alton, IL 62024

No. 58882 - People State of Illinois respondent vs. Susan Davidson, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

Very truly yours,

Juleann Hornyak
Clerk of the Supreme Court

P.S. The Mandate of this Court will issue to the Appellate Court on October 26, 1983.

APPENDIX 3

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 79-CF-637

People of the State of Illinois
Plaintiff,

v.

Susan E. Davidson,
Defendant.

MOTION TO DISMISS

Comes now the Defendant, SUSAN E. DAVIDSON, by and through her attorneys of record, DONALD E. GROSHONG and G. EDWARD MOORMAN of GROSHONG and MOORMAN, LTD., and pursuant to *Illinois Revised Statutes,* Chapter 38, Sections 114-1, 103-5 and 3-3(a)(3), the Fifth, Sixth and Fourteenth Amendments to the *Constitution of the United States* and Article I, Sections 8 and 10 of the *Constitution of the State of Illinois,* and hereby respectfully moves this Honorable Court dismiss the above-entitled cause, with prejudice, and in support of which Motion Defendant respectfully states as follows:

1. That the above-entitled cause, including all counts thereof, heretofore was called to trial, both the People of the State of Illinois and Defendant having announced to the Court that they were ready for trial;

2. That a jury of twelve, including two alternates, were selected and sworn to try this cause;

3. That opening statements were made to the jury by both Defendant and the State, following which the State called witnesses who were sworn, and who testified and were cross-examined;

4. That prior to verdict and over the repeated objections of Defendant, the State herein demanded and the Court granted a mistrial in the trail of this cause;

5. That such was an improper termination of the trial;

6. That a second, subsequent or further prosecution of the instant case is barred by prohibitions against double jeopardy, pursuant to the Fifth and Fourteenth Amendments to the *Constitution of the United States* and Article I, Section 10 of the *Constitution of the State of Illinois;*

7. That, to the extent *Illinois Revised Statutes,* Chapter 110A, Section 604(a), being Illinois Supreme Court Rule 604(a)(1) and (4), purports to authorize under the facts in the instant cause mid-trial interlocutory appeals by the State after jeopardy has attached, such statute and Supreme Court Rule is unconstitutional and violative of Defendant's rights to be free from double jeopardy pursuant to Article I, Section 10 of the *Constitution of the State of Illinois* and the Fifth and Fourteenth Amendments to the *Constitution of the United States,* and to a speedy trial pursuant to *Illinois Revised Statutes,* Chapter 38, Section 103-5, the Sixth and Fourteenth Amendments to the *Constitution of the United States* and Article 1, Section 8 of the *Constitution of the State of Illinois;*

8. That further prosecution of the instant case is barred by double jeopardy.

9. That, to the extent said Illinois Supreme Court Rule 604(a)(1) would appear to authorize Defendant's second and subsequent prosecution or further prosecution following the attachment of jeopardy and improper mistrial and the pursuit of mid-trial interlocutory appeal by the State, such Supreme Court Rule is unconstitutional on its face and as applied to Defendant;

10. That, to the extent said Illinois Supreme Court Rule 605(a)(3), would appear to toll the speedy trial provisions of statutory and constitutional law above cited, such statute is un-

constitutional both on its face and as applied, as a violation of the proscription against double jeopardy and the requirement of speedy trial contained in the *Constitution of the United States of America,* Amendments Six and Fourteen.

11. That *Illinois Revised Statutes,* Chapter 110A, Section 604(a)(1), being the Illinois Supreme Court Rule 604(a)(1), is unconstitutional on its face by reason of repugnancy to the *Constitution of the United States of America,* Amendments Five and Fourteen.

12. That *Illinois Revised Statutes,* Chaper 110A, Section 604(a)(1), being Illinois Supreme Court Rule 604(a)(1), is unconstitutional as applied by reason of repugnancy to the *Constitution of the United States of America,* Amendments Six and Fourteen.

WHEREFORE, Defendant respectfully prays this Honorable Court dismiss the above-entitled cause and all counts thereof with prejudice by reason of the violation of Defendant's statutory and constitutional rights to a speedy trial and since further prosecution hereof is absolutely barred by double jeopardy.

GROSHONG and MOORMAN, LTD.

By: Donald E. Groshong

and

By: G. Edward Moorman

227 West St. Louis Avenue
East Alton, IL 62024
Phone: 618-254-0147

APPENDIX 4

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 79-CF-637

People of the State of Illinois,
Plaintiff,

vs.

Susan Davidson,
Defendant.

ORDER

Matter comes on for hearing on Motion to Dismiss by Defendant. Parties present. Argument made and heard.

Court denies defendant's Motion to Dismiss, finding that said statute is not unconstitutional.

Date: 1-20-84

Charles Romani, Jr.
JUDGE

APPENDIX 5

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-84-0057

People of the State of Illinois,
Plaintiff-Appellee,

vs.

Susan E. Davidson,
Defendant-Appellant.

Appeal from the Circuit
Court of Madison County.

Honorable
Charles V. Romani, Jr.
Judge Presiding.

ORDER

THIS CAUSE COMES on before the court on motion of the State to dimiss the appeal in this cause, the court having considered said motion and the objection thereto filed by defendant, and it appearing to the court that an appropriately certified short record has been filed in this court, the court having examined said record and having been fully advised in the premises;

THE COURT FINDS that the facts surrounding the previous trial and appeal of this cause are set forth in this court's opinion in *People v. Davidson* (1983), 116 Ill.App.3d 164, 451 N.E.2d 978. The present dispute involves the last paragraph of that opinion. Therein this court stated:

> "In view of the result reached, we need not consider the State's other assertions of error, although a brief comment

> on the double jeopardy aspect of this case is appropriate. Because the mistrial was triggered by the defendant's untimely motions to suppress, she may be tried without violating the proscription against double jeopardy. (See *People v. Flatt* (1980), 82 Ill.2d 250, 265, 45 Ill.Dec. 158, 412 N.E.2d 509.) Accordingly, the cause is remanded to the circuit court of Madison County for a continuation of the trial. 451 N.E.2d at 984.

Despite this language, upon remand, the defendant filed a motion to dismiss the proceeding on grounds of former jeopardy. The trial court considered itself bound by this court's resolution of the question and denied the motion. Defendant appeals that denial pursuant to Supreme Court Rule 604(f) (87 Ill. 2d P. 604(f)). That rule states:

> "(f) The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy."

Thereafter, the State filed a motion to dismiss the appeal. Defendant filed a timely objection to the motion.

In essence, the State's argument is that under the doctrine of law of the case, this court's ruling on the jeopardy aspects of this case is entitled to *res judicata* effect and that this court's consideration of the issue in the previous appeal was more than adequate to dispose of defendant's right to appeal under Supreme Court Rule 604(f).

Supreme Court Rule 604(f) was adopted to provide a readily available mechanism for the review of denials of meritorious jeopardy claims prior to commencement of the retrial. Prior to the rule's promulgation, such review was discretionary and was available only by means of a motion for leave to file an original petition for a writ of prohibition, mandamus or habeas corpus. (*People ex rel. Mosley v. Carey* (1979), 74 Ill.2d 527, 387 N.E. 2d 325.) With adoption of the rule, review of such decisions

comes as a matter of right just as in appeals from final judgments of the circuit court pursuant to Supreme Court Rule 301 (87 Ill. 2d R. 301).

Defendant argues that to grant the State's motion to dismiss this appeal would deny her that right to a review of the denial of her motion to dismiss on grounds of former jeopardy.

The flaw in defendant's argument is that the right to review does not also embrace the right to have an appellate court which has already considered the issue to once again address that issue. Rule 604(f) entitles a defendant to appellate review of a claim of former jeopardy prior to retrial. Such has already been provided by this Court's decision in the first appeal. The issue of former jeopardy was presented in the prior appeal and was addressed in this court's opinion. The law of the case is that defendant may be tried without violating the proscription against double jeopardy. The appeal from the order of the trial court denying defendant's subsequent motion to dismiss the proceeding on grounds of former jeopardy is clearly frivolous and without merit.

IT IS THEREFORE ORDERED that the State's motion to dismiss the appeal in this cause be and thereby is granted and that this appeal be and hereby is dismissed.

IT IS FURTHER ORDERED that the mandate of this court be issued forthwith.

APPENDIX 6

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 3, 1984

Mr. Donald E. Groshong
Groshong and Moorman
227 W. St. Louis Avenue
East Alton, IL 62024

No. 59782 - People State of Illinois, respondent, vs. Susan E. Davidson, petitioner. Leave to appeal, appellate Court, Fifth District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1984.

APPENDIX 7

State of Illinois
Office of
Clerk of the Supreme Court
Springfield
62706

Juleann Hornyak
clerk

Telephone
area code 217
782-2035

April 27, 1984

Groshong and Moorman
Attorneys at Law
227 W. St. Louis Ave.
East Alton, IL 62024

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 59782 - People State of Illinois, respondent, vs. Susan E. Davidson, petitioner.

The motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal is *denied.*

Petitioner's alternative request that this court certify that it considered and decided the federal constitutional issue concerning Rule 604(a)(1) is *denied.*

The mandate of this court has today issued to the Clerk of the Appellate Court, Fifth District.

JH:th
cc: AG - Criminal (Mark L. Rotert)

APPENDIX 8

No. 59782

IN THE
SUPREME COURT OF ILLINOIS

People of the State of Illinois,
Plaintiff-Appellee,

vs.

Susan E. Davidson,
Defendant-Appellant.

Appeal from the Appellate Court,
Fifth District, State of Illinois

No. 5-84-0057

Original Appeal from the Circuit
Court for the Third Judicial
Circuit, Madison County, Illiois

No. 79-CF-637

Hon. Charles V. Romani, Jr.,
Judge Presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Susan E. Davidson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Illinois entered herein on April 27, 1984, denying reconsideration of the order denying appellant's Petition for Leave to Appeal to the Supreme Court of the State of Illinois from the order of the Appellate Court of Illinois, Fifth District, entered February 9, 1984, dismissing Appellant's appeal.

This appeal is taken pursuant to Title 28, *United States Code*, section 1257(2).

SUSAN E. DAVIDSON

By: Donald E. Groshong
Attorney for Appellant
Groshong & Moorman, Ltd.
227 West St. Louis Avenue
East Alton, IL 62024
(618) 254-0147

APPENDIX 9

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 79 CF 637

People of the State of Illinois,

vs.

Susan E. DAvidson,
Defendant.

REPORT OF PROCEEDINGS
MOTION TO DISMISS

Report of Proceedings before the HONORABLE CHARLES ROMANI, JR., in the above-styled cause on the 20th day of January, 1984.

APPEARANCES

MR. MARK ROTERT
MS. MARCIA FRIEDL

Assistant Attorneys General, appearing on behalf of the People of the State of Illinois

MR. DONALD GROSHONG
MR. G. EDWARD MOORMAN

Attorneys at Law, appearing on behalf of the Defendant Susan E. Davidson

WHEREUPON:

THE COURT: Okay. This is People of the State of Illinois versus Susan E. Davidson. Matter comes before the Court on a Motion to Dismiss filed by the Defendant.

Present for the Defendant is Mr. Donald Groshong and Mr. G. Edward Moorman. Present for the People of the State of Illinois Assistant Attorney General Mark Rotert, Marcia Friedl, and Tony Ficarelli. (Phonetic spelling)

The Defendant—Let the record indicate the Defendant is not present.

Mr. Groshong, are you waiving the presence of the Defendant for the purposes of this motion?

MR. GROSHONG: That's correct.

THE COURT: Okay. Are you ready to proceed?

MR. GROSHONG: As far as I'm concerned.

MR. ROTERT: Yes, we are, Your Honor.

THE COURT: Mr. Groshong.

MR. GROSHONG: Thank you, Your Honor.

I previously had given a copy of the Motion in hand to the Attorney General. Basically what this Motion requests is that the instant cause and all counts thereof be dismissed as a matter of double jeopardy. A speedy trial point is also made.

Directing myself to the double jeopardy point the Motion makes it clear and the recollection of all is that this cause previously was called to trial and commenced trial and was in what we will call the mid-trial stage previously a couple years ago where witnesses were sworn, the jury was impanelled and sworn, and opening statements were made, and that during the trial there was a mistrial for the purposes of an interlocutory appeal by the State pursuant to Illinois Supreme Court Rule 604 and the authority of a couple of cases, *People versus Flatt* and *Young* which themselves talk about Rule 604 for that matter, but it is our position that notwithstanding Rule 604 trial is barred at this time by reason of double jeopardy.

First of all I don't think there's any question that jeopardy previously attached as a matter of record in this case. The question is whether retrial is permitted notwithstanding the attachment of jeopardy by reason of Supreme Court Rule 604 authorizing a —mid-trial appeals.

Our position is that the Supreme Court Rule 604 is unconstitutional on its face. Our position is that it is also unconstitutional and repugnant to the federal constitution as applied in this case because to permit a retrial or a second and subsequent trial after jeopardy has attached is repugnant to the federal constitution. So that we want it very clear that our position is that the Supreme Court rule itself is unconstitutional both on its face and as applied in that it is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is also repugnant to collateral Illinois Constitution provisions that say the same thing essentially and are interpreted in the same way by our own Court and a couple statutes which are cited.

The point on speedy trial is made in the Motion. I don't think I need to elaborate on that. It's essentially the same point shifting from the double jeopardy argument to a speedy trial point.

MS. FRIEDL: Your Honor, the Appellate Court specifically ruled on the double jeopardy issue in this case; that the last paragraph of the opinion addresses it, and the theory there is based on People versus—that was illustrated in *People versus Flatt* is that where the Defendant makes an untimely Motion to Suppress as in this case that that is the cause of the mistrial and double—and the Defendant is not then prohibited from being retried, and does—Your Honor, you have a copy of the Appellate Court's opinion?

THE COURT: I have read it. I don't have one with me right now.

MS. FRIEDL: Again they specifically address that issue and so does *People versus Flatt*.

MR. GROSHONG: My only response to that is that that point was never raised nor briefed in the—in the Appellate Court and that that single sentence in the final paragraph of the Appellate Court opinion is pure dicta.

MS. FRIEDL: Well, Your Honor, *People versus Flatt* did specifically address that and if I recall our briefs did discuss the double jeopardy issue. At page ten of our initial brief we addressed that issue and the Appellate Court agreed, and again even if you look at the Flatt case where the facts are substantially the same as here they specifically held that there is no double jeopardy prohibition.

With respect to the speedy trial 604 (a)(4) requires that the statute be—that the speedy trial term be tolled and it's for the same reason the same rational that otherwise the fact that there is no double jeopardy problem here where the Defendant is the cause of the—of the delay that time period will not be counted in the speedy trial term.

MR. GROSHONG: No further argument.

THE COURT: No further argument? Nothing further? Okay, the Court having heard arguments on the Motion to Dismiss based on the speedy trial and double jeopardy grounds as stated in the Motion the Court will deny the Motion to Dismiss finding that the Statute is not unconstitutional.

MR. GROSHONG: Please the Court, at this time in light of that ruling we would file Notice of Appeal pursuant to Supreme Court Rule 604 (f). That is not in the hardbound volume by the way because it's so new.

(Whereupon, a discussion was held off the record.)

* * * * *

APPENDIX 10

MR. GROSHONG: I would also reiterate, of course, this is being done over the persistent objection of the defendant, herself.

THE COURT: Your position is that you want to proceed to trial?

MR. GROSHONG: That is correct. We object to any Mistrial; we object to any continuance; we are ready to go.

THE COURT: Okay. The Motion is made over the objection of the defendant; it is granted at the—by the Motion of the State; and, again, the Juror is withdrawn and a Mistrial is declared.

APPENDIX 11

Where the prosecution moves for mistrial *after* jeopardy has attached, however, the matter of double jeopardy is crucial. The State cites cases which held that mistrials attributable to the Defendant do not present double jeopardy problem. The mistrial in the instant case, however, can not be laid at the feet of Defendant. The appeal in this case is not consistent with the double jeopardy clause.

All Defendant did at trial was seek rulings on two evidentiary matters: whether certain exemplars were prejudicial, and whether certain testimony violated the attorney-client privilege. The Court ruled favorably to Defendant on these issues (C. 682-683; R. 1574-1576, 1618). The Defendant did not receive rulings at trial on motions to suppress based on illegal search and seizure, on involuntariness of a confession, on failure to furnish in discovery as in *Flatt* or on violations of state statute as in *Tomasello*. (R. generally).

State argues at page 4 of its brief that this case is not "particularly unusual", nor does it involve "unique legal issues". In one sense, this statement is patently untrue. The mere fact that the State wants to appeal this case mid-trial makes the case exceptional, considering the rarity of that situation. Also, where we have evidence develped by searches of lawyers safe deposit boxes, and by interviews with legal secretaries, we have unique factual problems.

In another sense, however, the State is correct. For the defense to object at trial that certain documents if introduced would be prejudicial beyond their probative value, or for the defense at trial to raise questions of attorney-client privilege is not unusual or unique at all. These are traditional evidentiary considerations not in any sense involving "exclusionary rule" questions. These are not "motions to suppress". Moreover, these are matters which have never been held to be appealable by the State and have not been made so under the holdings of *Young* and *Flatt*. The rulings of the trial court in the instant case are not appealable by the State. The appeal should therefore be dismissed.

APPENDIX 12

12A

28 *United States Code* § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

12B

(3) By writ of certiorari, where the validity of a treaty or statute of the Untied States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

12C

28 *United States Code* § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (June 25, 1948, c. 646, 62 Stat. 963.)

12D

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

12E

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

12F

604. (Supreme Court Rule 604). Appeals from Certain Judgments and Orders.

(a) Appeals by the State.

(1) *When State May Appeal.* In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure

of 1963;[1] arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence.

12G

(f) The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy.

Amended June 15, 1982, eff. July 1, 1982; Aug. 9, 1983, eff. Oct. 1, 1983.

12H

315. (Supreme Court Rule 315). Leave to Appeal From the Appellate Court to the Supreme Court

(a) Petition for Leave to Appeal; Grounds. A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion....

12I

114-12. Motion to suppress evidence illegally seized

§ 114-12. Motion to suppress evidence illegally seized.

(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant at any trial.

(c) The motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. If the motion is made during trial, and the court determines that the motion is not untimely, and the court conducts a hearing on the merits and enters an order suppressing the evidence, the court shall terminate the trial with respect to every defendant who was a party to the hearing and who was within the scope of the order of suppression, without further proceedings, unless the State files a written notice that there will be no interlocutory appeal from such order of suppression. In the event of such termination, the court shall proceed with the trial of other defendants not thus affected. Such termination of trial shall be proper and shall not bar subsequent prosecution of the identical charges and defendants; however, if after such termination the State fails to prosecute the interlocutory appeal until a determination of the merits of the appeal by the reviewing court, the termination shall be improper within the meaning of subparagraph (a)(3) of Section 3-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended,[1] and subsequent prosecution of such defendants upon such charges shall be barred.

(d) The motion shall be made only before a court with jurisdiction to try the offense.

---

[1] Paragraph 3-4 of this chapter.

(e) The order or judgment granting or denying the motion shall state the findings of facts and conclusions of law upon which the order or judgment is based.

Amended by P.A. 79-1360, § 26, eff. Oct. 1, 1976.

APPENDIX 13

Susan E. Davidson,
Appellant,

v.

Illinois.

No. 84-137.

Appeal from the Appellate Court
of Illinois, Fifth District.

Case below, 116 Ill.App.3d 164, 71 Ill.
Dec. 824, 451 N.E.2d 978.

Oct. 1, 1984. The appeal is dismissed for want of a substantial federal question.

APPENDIX 14

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Case # 79 CF 637

The People of the State of Illinois,

vs.

Susan Davidson,
Defendant.

State's Attorney: Mark Rotert, Marcia Friedl

Defense Attorney: Donald Groshong, Ed Moorman

AMENDED ORDER AND JUDGMENT ON SENTENCE

(Filed March 25, 1985)

Case called for Sentencing. Counsel present together with the Defendant.

No Evidence presented in Aggravation.

No Evidence presented in Mitigation.

After due consideration, it is ordered and adjudged that the Defendant, Susan Davidson, be sentenced as follows:

> Term in the Department of Corrections for a period of thirty years as to the offense of Murder and twenty years as to the offense of Solicitation to Commit Murder with said sentences to run concurrent with one another.

The Court finds the Defendant's age to be 40 years.

Judgment entered on the sentence. Appeal rights stated.

X Mittimus ordered to issue.

DATED: 3-25-85

Charles Romani, Jr.
Circuit Judge

APPENDIX 15

APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-85-0211

People of the State of Illinois,
Plaintiff-Appellee,

v.

Susan E. Davidson,
Defendant-Appellant.

September 9, 1987

Justice HARRISON delivered the opinion of the court:

Defendant, Susan E. Davidson, was charged by information with murder under the accountability theory, solicitation to commit murder and conspiracy to commit murder. A jury in the circuit court of Madison County found her guilty of all three offenses. The trial court entered convictions on the three guilty verdicts and sentenced defendant to concurrent prison terms of 30 years for murder and 20 years for solicitation, but did not enter sentence on the conspiracy conviction. Defendant contends of appeal (1) the court erred in failing to instruct the jury on self-defense and voluntary manslaughter, (2) defendant was placed in jeopardy twice for the same offense, (3) defendant's equal protection and due process rights were violated, (4) the court erred in failing to remove the prosecutor from the case, (5) the court erred in failing to suppress various documents allegedly written by defendant, (6) the court erred in denying defendant the opportunity to attack the credibility of a defense witness, (7) the State failed to properly allege and prove the offense of solicitation, (8) the State failed to properly allege and prove the offense of conspiracy, (9) the court erred in failing to exclude handwriting exemplars offered by the State, and (10) the court erred in admitting hearsay evidence. For the reasons which

follow, we vacate defendant's convictions for solicitation and conspiracy but affirm the conviction and sentence for murder.

The State's evidence showed that defendant was in the midst of an affair with a man named William Gill, that defendant and Gill planned the murder of defendant's husband, Stephen Davidson, and that Gill killed Stephen Davidson on the night of October 31, 1979. There was no effort to prove defendant was at home when her husband was murdered. Gill, in a separate trial prior to defendant's trial, was convicted of voluntary manslaughter, a conviction this court affirmed on appeal. *People v. Gill* (5th Dist.1982), 106 Ill.App.3d 1164, 64 Ill.Dec. 525, 439 N.E.2d 1333 (Rule 23 Order).

Police were called to the home of Stephen and Susan Davidson in Godfrey, Illinois, on the night of October 31, 1979, and upon investigation found the body of Stephen Davidson on the floor in a room in the basement of the home. The victim's head, hands and clothes were heavily stained with blood, and there was blood on a wall and on a couch in the room where the body was discovered. Police also found blood on the inside and outside of a garage door. An autopsy determined that Stephen Davidson died from a gunshot wound to the head.

Ronald Tune, a detective with the Madison County sheriff's department testified that he questioned defendant on the night of the murder at the home of one of defendant's neighbors. Defendant told Tune that she and her daughter, Kimberly, left the house at 5:40 p.m. to go to Kimberly's swimming practice. They left the practice at 7:10 p.m. and returned home at 7:40 p.m. Defendant told Tune her husband was watching television when she left the house and that his only plan was to possibly buy some milk at a local grocery store. She denied being involved in any affair. Later that night at the Alton police department, Tune again questioned defendant. At this time defendant stated that she had met Gill during tennis lessons in March of 1979. She and Gill had arranged meetings with each other in their cars two or three times and had kissed, but she denied

engaging in sexual relations with him. Tune questioned defendant a third time later that night at the Alton police department. In this third interview, Tune asked whether defendant had had sexual relations with Gill, and defendant replied that she had done so two or three times. Defendant also told Tune that Gill knew she would be at swimming practice that night. Tune testified that defendant told him she made a phone call from the swimming practice to her home to see if her husband wanted food from a certain restaurant for dinner. She made this call at 7 p.m. and received no answer. Defendant denied being involved in her husband's death.

Sergeant Charles Zukas of the Madison County sheriff's department testified that he went to St. Joseph's Hospital in Alton at 10:30 p.m. on October 31 where he spoke with Gill, who appeared to have an injury to his right hand. Gill told Zukas that he was at the parking lot of a movie theater in Granite City when a man with a knife robbed him. Gill stated that the robber cut him on the right hand, then Gill reached for a .38 caliber Colt revolver which he kept under the seat of his car, but the gun was not there.

Jerry Knight, a Madison County sheriff's deputy, testified thht on November 1, 1979, he was at a park along the banks of the Mississippi River with other officers. William Gill was also present. Gill picked up a rock and threw it into the river. Police marked the location and dragged the river until, on November 4, authorities found a Colt revolver with a broken hand grip.

Larry Lorsbach, director of the area State Crime Laboratory, testified that the gun found in the river had a wooden grip which was broken, and that three pieces of wood found under and near the body of Stephen Davidson on the night he was murdered came from the gun found in the river. Lorsbach further testified that spent cartridges found at the Davidson home came from the same variety of gun as the one found in the river.

Robert McGarvey testified for the State that he knew William Gill and that he and Gill were "very close." He knew that Gill

carried a .38 caliber Colt revolver, and testified that the gun which had been found in the river appeared to be the one owned by Gill. McGarvey testified that in the summer of 1979, Gill began jogging, losing weight, and wearing better clothes, yet was not as sociable as he had been previously. McGarvey further testified that on November 2, 1979, Gill's enstranged wife gave him keys to Gill's apartment because Gill had been arrested. McGarvey and McGarvey's wife went to the apartment to collect Gill's clothes and valuables because the apartment was in a "bad neighborhood." In the process of gathering these items, McGarvey accidentally pushed a cushion off of a couch, allowing him to notice a lump in one of the cushions. He unzipped the cushion and found a white plastic bag inside. The bag contained cards and letters. The McGarveys took the bag and its contents home with them. They then went to see defendant at the funeral home where visitation was being held for Stephen Davidson. When they arrived at the funeral home, defendant approached them, the McGarveys introduced themselves to defendant, then told defendant they had found some letters. Defendant appeared relieved. McGarvey then asked her if she knew Gill was going to her house the night of the murder, and defendant responded affirmatively. McGarvey also asked if defendant knew Gill was going to kill her husband, and according to McGarvey, defendant said, "[Y]es but my God it wasn't supposed to happen that way." She told McGarvey that Gill "was supposed to park his car some distance away, jog to the house, go in through an open door, go into the house, knock him out, put him in the trunk of his car and take him out and make it look like he had an accident." McGarvey testified that defendant said, "I didn't mind him being shot but he was beaten." McGarvey further testified that he and his wife gave the cards and letters to Gill's attorney, Russ Meyer.

McGarvey's wife, Karen McGarvey, also testified. In addition to substantially corroborating the testimony of her husband, she stated that defendant came to their home on November 4, 1979, and said she wanted the letters as a last

remembrance of Gill, but Karen McGarvey refused to turn them over to defendant.

The State relied heavily upon the cards and letters found in Gill's apartment, which were writtn by Gill and defendant to each other, to prove defendant's involvement with the murder. In this correspondence, defendant and Gill discussed their secret meetings, expressed love for each other, and discussed plans to marry in the future. Letters from defendant to Gill referred to fears of going to jail, and also include references to "it" and a "plan," which the State attempted to show were references to the plan to kill Stephen Davidson. The following are excerpts from some of the letters written by defendant to Gill:

> "The final outcome of this entire plan is so very important to me, I am very worried that something will go wrong and you and I will get caught."
>
> * * * *
>
> "I can see this whole thing blowing up before my face. I will take care of what I need to take care of and low and behold you will be living back at home and somehow she will get her hooks into you and you won't leave. Nice arrangement huh? I will get to spend the rest of my life in jail and you will get to spend the rest of your life with her."
>
> * * * *
>
> "It then went through my mind that once 'it' is taken care of then the waiting period before we can get married will be like hell."
>
> * * * *
>
> "Well, the one thing that keeps popping into my mind is that once 'it' is taken care of — then we will have to start casually seeing each other or bumping into each other and then we can start dating and then after dating for awhile then FINALLY we can get married — good God that's a long way off."

* * * *

"Steve is really hyper now about people breaking in our house. The statement he made about trusting no one anywhere and at any time really got to me last night. I just wonder how anyone will get to him now. He has been so very cautious these last few weeks he really mystifies me."

* * * *

"In the back of my mind what I am trying to prepare you or prepare me for is the fact that *you* will be able to change your mind and go back to your old life if you decide to or if you want to but the way we have things planned for my end of it there will be no changing of my mind and there will be no turning back or going back to my old life."

* * * *

"One of my biggest faults is the fact that I care entirely too much about what other people think. And I think that 'afterwards' I will be stared at and put down so badly taht if I move to another town where no one knows me that no one will ever figure out what we have done and who we are, etc."

* * * *

"All of a sudden it dawned on me that our money is going to be a little tight — hopefully, I will have the insurance money but that will not be able to be used for traveling or current expenses — because I intend to invest that money and only use the interest — and the interest is supposedly supposed to be used to pay my house payment — if it will cover it."

The State also presented evidence of a life insurance policy on the life of Stephen Davidson with a death benefit of $46,000, which doubled to $92,000 in case of accidential death. Defendant was named as beneficiary.

The defense called as its primary witness William Gill. Gill, who was married and had four children, testified he had met defendant in March or April of 1979 while they were both attending the same tennis lessons. On May 2, 1979, a group from the class, including Gill and defendant, went to a local tavern. Upon leaving the tavern, Gill and defendant talked in the parking lot and later kissed. Gill and defendant met after subsequent tennis lessons to talk and began going to lunch together on occasion. Gill further testified he talked by phone with defendant 100 times during May of 1979. They also corresponded by mail, and sometimes he would personally deliver letters to defendant at her place of employment. Gill testified that in mid-May he realized he was in love with defendant and believed she was in love with him. On June 7, 1979, Gill and defendant decided to stop seeing each other because of fears that their relationship might disrupt their families. However, they began seeing each other again the next week. Gill testified that early in their relationship they discussed divorcing their spouses, and that their eventual goal was to marry each other. In mid-August, Gill left his wife, moved out of the family home, and moved into his own apartment because his wife had learned about his relationship with defendant. Gill and defendant saw each other frequently after he moved into the apartment. He testified that in the third week of October, he and defendant broke up again. Defendant later brought him all the letters he had written to her. He put these letters in a white plastic bag behind a cushion on his couch.

On October 31, 1979, Gill called defendant at her office but she did not have time to talk. That day he decided he had to confront Stephen Davidson about a divorce from defendant, so he left his apartment at approximately 5:30 p.m. to go the Davidson home. Gill, who testified he owned a Colt pistol, took his gun with him, concealing it under his clothes. He testified he took his gun "[b]ecause if he wanted to start something, if he wanted to start a fight then that could be used to keep him away from me while I got away." At another point

Gill testified he carried his gun wherever he went. Gill testified he did not go to the Davidson home intending to kill Stephen. He further testified that defendant had not agreed to have him kill her husband and that defendant did not do anything to aid him to cause harm or kill Stephen or assist in planning entry into the house. He stated that defendant did not even know he was going to confront her husband. Gill drove to a grocery store about a mile from the Davidson home, then jogged the remainder of the distance. He testified he parked at the store partly because he did not want anyone to know he was at the Davidson home. Upon arriving at the house, Gill did not go to the front door, testifying that if Stephen saw him coming, he would "slam the door in my face." Instead, Gill, who had been at the Davidson home on one previous occasion, went to one of two garage doors. He knew this particular door could only be operated manually, while the other door was controlled by a powered garage-door opener. He did not know this manually operated door would be unlocked, but he opened the door, went inside, closed the door behind him, then went through the garage to a door that leads into the basement of the home. The basement is on the same level as the garage. In the garage he picked up a piece of wood from a wood pile but testified he did not know why he did so. He knocked on the door to the basement, and simultaneously tried the knob, found the door to be unlocked, then went inside. Once inside, he noticed he had the piece of wood in his hand, so he threw it on the floor because he did not want Stephen to see him with the wood in his hand. Then Gill noticed Stephen standing at the top of the stairs leading to the main floor. Stephen asked Gill what he was doing there, and Gill responded that he wanted to discuss giving defendant a divorce. Stephen became upset. Gill told him that he and defendant were in love and that defendant wanted a divorce. By that time Stephen was at the bottom of the stairs, Gill backed up into a family room, then Stephen punched Gill in the mouth, and told him he would never give defendant a divorce. Gill fell against a couch, then Stephen jumped on him

and a fight ensued, according to Gill. Gill testified that his gun had fallen on to the couch during the fight. Both he and Stephen reached for it and the gun discharged but no one was hit. The fight continued and the gun discharged again. Stephen paused for a moment, then continued the struggle. Gill admitted Stephen was shot with Gill's gun but that both he and Stephen were holding the gun at the time it went off. Gill finally obtained exclusive control of the gun, then began striking Stephen on the head with it. He also grabbed a piece of wood from the floor and struck Stephen with it until he stopped fighting. Gill took the gun and left the house following the same path by which he entered. He noticed that his right hand was bloody. He drove to the banks of the Mississippi River and threw the gun and his clothes into the river. He then drove to a hardware store in Granite City and went to the restroom where he washed the wound on his hand. Next, he went to a drugstore to get medication and a bandage. He then drove back to his apartment, and later went to St. Joseph's Hospital in Alton. He admitted that while he was there he told officer Zukas a false story about being robbed.

Gill further testified that at the time of trial he was still in love with defendant and that defendant said she was still in love with him. Gill stated that defendant had told him she would not be home on the evening of October 31, but he testified that defendant had not given him permission to enter the house that night. He also testified he knew Stephen would be upset when he confronted him. On cross-examination, the prosecutor asked Gill, "Well, you took a gun because you knew he would be upset so you thought about it, didn't you?" Gill admitted that he entered the home without permission and entered with a deadly weapon.

Gill also testified regarding the cards and letters found in his apartment. On cross-examination, Gill admitted that defendant had written to him often and that he placed these cards and letters in a bag inside a cushion. The prosecutor asked: "So if a

piece of paper came out of the white garbage bag found in your apartment the jury is entitled to assume that either you wrote it or Mrs. Davidson wrote it. Is that right?" Gill responded, "I suppose." He was also asked about some typewritten letters found with the other correspondence. "So then we can also tell the jury that if a piece of paper came out of that white garbage bag and it was typed it must have been authored by Mrs. Davidson. Is that fair to say?" To this Gill also answered, "I suppose, yes." While admitting the existence of this correspondence, Gill's testimony placed an innocent construction on it contents. For example, he testified that references to "it" were simply references to a divorce and nothing more.

The defense also presented the testimony of Kimberly Davidson, the Davidson's daughter who was 16 years old at the time of trial. Kimberly testified that on October 31, 1979, she came home from school at 3:30 p.m. She opened the manually operated garage door, got a house key from a box in the garage, then unlocked the door to the house. She stated that one garage door is manually operated, while a second door is controlled by a powered opener. Kimberly testified it was the family's practice to leave the manually operated garage door unlocked so she could get to the key to let herself in if her parents were not home. On this day, her father came home at approximately 5 p.m. and her mother arrived at approximately 5:15 p.m. Kimberly and her mother later left for swimming practice. While at the practice, Kimberly saw her mother on the telephone, but did not see her talking into the phone. Kimberly and her mother stopped at a fast-food restaurant after the practice, and returned home between 7:30 and 7:45 p.m. When they got home, defendant went into the garage and unlocked the door to the house, then turned to Kimberly, asked her why a pair of glasses would be on the floor, then started screaming and crying. Defendant and Kimberly then went to three houses in the neighborhood to get help, but when they could get no response, they returned home. Defendant attempted to call an ambulance but the phone number for the ambulance service had been

changed so she called Kimberly's grandfather, Harold Davidson. Kimberly further testified that at the funeral home during visitation for her father, her mother was upset and crying, and that she told two people in blue jeans to "get out of here."

The jury returned verdicts of guilty of murder, conspiracy and solicitation. The trial court entered convictions on all three offenses, then sentenced defendant to 30 years' imprisonment for murder and a concurrent term of 20 years for soliciation, but did not impose a sentence for conspiracy.

Defendant first contends the court erred when it failed to instruct the jury regarding self-defense and voluntary manslaughter. Because defendant was accused of murder by accountability, we must look to the evidence regarding the actions of William Gill to determine whether such instructions were required.

We find the facts here very similar to those addressed by the supreme court in *People v. Sloan* (1986), 111 Ill.2d 517, 96 Ill.Dec. 55, 490 N.E.2d 1260. In *Sloan,* the evidence showed the defendant had broken down a door to enter a home and killed the boyfriend of his former girlfriend. The defendant testified that he took a gun with him for protection when he went to the home in the early morning hours, but that the sole purpose of his visit was to see his child. The defendant testified that the victim started charging him, the defendant brought the gun out, the defendant then stumbled, and the gun went off accidentally. The supreme court found that the defendant's use of force was precluded by section 7-4(c) of the Criminal Code of 1961 (Ill.Rev.Stat.1979, ch. 38, par. 7-4(c)). (111 Ill.2d 517, 521, 96 Ill.Dec. 55, 57, 490 N.E.2d 1260, 1262.) Section 7-4, concerning the use of force by an aggressor, provides:

> "The justification described in the preceding Sections of this Article is not available to a person who:
>
> (a) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or

(b) Initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant; or

(c) Otherwise initially provokes the use of force against himself, unless:

(1) Such force is so great that he reasonably believes that he is in imminent danger of death or great bodily harm, and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or

(2) In good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force." (Ill.Rev.Stat. 1979, ch. 38, par. 7-4.)

The supreme court in *Sloan* found that the defendant was clearly the aggressor and that the slight display of force by the victim was provoked by the defendant's own conduct. The court, in holding that instructions on self-defense and voluntary manslaughter were not required, concluded: "The defendant's armed and unauthorized entry of the residence at that hour [2 a.m.] in the morning belies his ostensibly peaceful purpose in making the visit." 111 Ill.2d 517, 522, 96 Ill.Dec. 55, 57, 490 N.E.2d 1260, 1262.

[1] In the case *sub judice,* defendant argues that self-defense and voluntary manslaughter instructions should have been given because Gill testified that once he entered the Davidson home, Stephen Davidson approached him, punched him in the face, then began fighting with him. Even if we accept this evidence as true, Gill's own testimony shows that Stephen Davidson's reac-

tion was provoked by defendant's own conduct. Gill's own testimony indicated that he, Gill, was the aggressor. He came to the home armed with a gun. He admitted picking up the piece of wood from a wood pile before entering the home, but then decided to discard it. He parked his car a mile from the home, then jogged the remainder of the distance so no one would know he was at the home. He testified he knew Stephen Davidson would be upset when confronted about divorcing his wife. Gill admitted he did not have permission to enter the home that night. He did not go to the front door because he knew if Stephen Davidson saw him coming, he would "slam the door in my face," so he entered through the garage door and the basement. Applying the decision in *Sloan,* we do not believe that under these circumstances defendant was entitled to instructions regarding self-defense or voluntary manslaughter due to section 7-4(c) of the Criminal Code. We have also examined defendant's other arguments regarding the instructions and likewise found them to be without merit.

[2] Defendant next contends she was twice placed in jeopardy for the same offense. Defendant was tried for the first time in this case in 1982. In the middle of that first trial, defendant moved to exclude handwriting exemplars which she executed as well as testimony of a prosecution witness. The trial court granted these motions. The State then moved for a mistrial so that it could take an interlocutory appeal to this court. The trial court granted the mistrial, and the State appealed pursuant to Supreme Court Rule 604(a)(1) (87 Ill.2d R. 604(a)(1)). On appeal, this court held that defendant's motion to exclude as untimely and we vacated the orders excluding the evidence and remanded the cause for a continuation of the trial. (*People v. Davidson* (1983), 116 Ill.App.3d 164, 71 Ill.Dec. 824, 451 N.E.2d 978 (hereinafter *Davidson I*). In that opinion, we addressed the double jeopardy issue which was raised by defendant at that time and concluded that "[b]ecause the mistrial was triggered by the defendant's untimely motions to suppress, she may be tried without violating the proscription against double

jeopardy." (116 Ill.App.3d 164, 172, 71 Ill.Dec. 824, 830, 451 N.E.2d 978, 984.) Therefore, the double jeopardy issue has been addressed by this court and decided against defendant. In addition, defendant unsuccssfully sought review of *Davidson I* in the Illinois Supreme Court. Upon remand after *Davidson I,* defendant filed a motion to dismiss on double jeopardy grounds. After the trial court's denial of the motion, defendant's appeal to this court of that denial was dismissed, and her efforts to obtain review by the supreme courts of both Illinois and the United States were unsuccsssful. Defendant still contends, however, that because our opinion in *Davidson I* did not address the constitutionality of Rule 604(a)(1), and because she raised the constitutional issue at her second trial, we should now address it. In deciding the double jeopardy question in *Davidson I,* we cited the supreme court opinion in *People v. Flatt* (1980), 82 Ill.2d 250, 265, 45 Ill.Dec. 158, 166, 412 N.E.2d 509, 517, which found that allowing retrial after an interlocutory appeal by the State pursuant to Rule 604(a)(1) did not violate the constitutional proscription against double jeopardy when it was defendant's conduct which necessitated the mistrial. Therefore, we reject defendant's argument that Rule 604(a)(1) is unconstitutional and find the proscription against double jeopardy was not violated here.

[3] Defendant further argues that her rights to equal protection and due process under the fourteenth amendment to the United States Constitution (U.S.Const., amend. XIV) have been violated by the failure of Illinois courts to uniformly interpret and apply Rule 604(a)(1) as that rule relates to the law of double jeopardy. Defendant argues that in *Davidson I* we failed to follow the decision in *People v. Johnson* (1983), 113 Ill.App.3d 367, 69 Ill.Dec. 285, 447 N.E.2d 502, and that under *Johnson* she could not be retried. Thus she contends that her rights to equal protection and due process have been violated because of the lack of uniform application of the rule. Assuming without deciding that *Davidson I* and *Johnson* are inconsistent, the fourteenth amendment does not asssure uniformity of

judicial decisions or immunity from judicial error. (*Beck v. Washington* (1962), 369 U.S. 541, 82 S.Ct. 955, 962-63, 554-55, 8 L.Ed.2d 98, 110.) Therefore, defendant's argument is without merit.

The next issue raised by defendant is whether the trial court erred when it failed to remove the prosecutor from defendant's case. Mark Rotert, an assistant Attorney General, prosecuted defendant at both her first and second trials because the Madison County State's Attorney withdrew from the case. Prior to her second trial, defendant moved to remove the Attorney General's office from the case on the grounds that Rotert had contributed to an anti-retention campaign aimed at Judge William Johnson, who had presided over defendant's first trial. Advertisements placed in newspapers during this campaign criticized Judge Johnson's rulings in defendant's first trial. Rotert conceded that he had made a contribution to the campaign but stated that he was not personally involved in generating adverse publicity about Judge Johnson's rulings in defendant's case. Judge Charles Romani, who presided over defendant's second trial, found that whether the prosecutor had contributed to an anti-retention campaign against Judge Johnson was no longer relevant. We agree.

Section 6 of "AN ACT in regard to attorneys general and state's attorneys" (Ill.Rev.Stat.1983, ch. 14, par. 6) provides in part: "Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding * * *." The appointment of a special prosecutor involves the exercise of judicial descretion in the determination of whether a contigency authorizing the exercise of such power has arisen. (*People v. Trolia* (1982), 107 Ill.App.3d 487, 496, 63 Ill.Dec. 155, 162, 437 N.E.2d 804, 811, *cert. denied* (1983), 460 U.S. 1044, 103 S.Ct. 1442, 75 L.Ed.2d

798.) The term "interested" as used in this statute has been interpreted to mean that the prosecutor must be interested as (1) a private individual, or (2) a party to the action. (107 Ill.App.3d 487, 496, 63 Ill.Dec. 155, 162, 437 N.E.2d 804, 811.) Defendant cites to *People v. Barton* (1984), 122 Ill.App.3d 1079, 1084, 78 Ill.Dec. 419, 423, 462 N.E.2d 538, 542, *cert. denied* (1985), 469 U.S. 1213, 105 S.Ct. 1185, 84 L.Ed.2d 332, to argue that adverse publicity generated by a prosecutor about a criminal case can mean the prosecutor is interested in the case. The State argues, citing *People v. Trolia,* that not every act of prosecutorial misconduct must result in removal.

[4] We find no abuse of discretion in Judge Romani's decision not to remove the Attorney General's office from the case. Judge Johnson was no longer presiding over defendant's case, and as of the time of the retention election had not presided over the case for over 2½ years. Rotert stated he was not directly involved in producing the advertisements. Furthermore, we agree with the State that if defendant believed the advertisements regarding Judge Johnson were a cause of potential prejudice to her second trial, the *voir dire* process would serve as a safeguard. Defendant has not raised the issue of whether the jury was affected by the pretrial publicity. We have reviewed the record and fail to see how defendant was prejudiced by the court's decision not to remove the Attorney General's office from the case.

Defendant next raises multiple arguments to support her contention that the cards and letters authored by her and Gill should have been suppressed. The trial court held a lengthy hearing on defendant's suppression motion, then ruled the correspondence was admissible. The evidence at the suppression hearing showed that the McGarveys gave attorney Russell Meyer the cards and letters which they had found in Gill's apartment. Meyer at this time was Gill's attorney, but was not yet representing defendant. Meyer began serving as defendant's counsel a short time later when he entered an appearance on her behalf in the trial court.

After receiving the cards and letters from the McGarveys, Meyer gave the documents to Edward Unsell, a lawyer working for Meyer's firm, and told Unsell to place them in a safe-deposit box. Meyer testified that he feared possible criminal liability arising from his possession of the correspondence. Attorneys from the Madison County State's Attorney's office had discussed with him their belief he could be charged with obstructing justice if he failed to give the letters to authorities. On March 28, 1980, Meyer, Unsell, and attorneys from the State's Attorney's office gathered at a tavern in Edwardsville. While this was primarily a social gathering, the topic of the cards and letters was raised. Attorney Unsell made comments about transferring the documents to the attorney who was then serving as defendant's primary counsel, Donald Groshong, and made a reference to having the "keys." An assistant State's Attorney asked Unsell in which bank the letters were located, but Unsell did not respond. Unsell testified that he was under the impression everyone knew the correspondence was being kept at a bank. Meyer testified it was common knowledgee that he had possession of the letters. An assistant State's Attorney testified he believed Unsell made some comments about the correspondence being in a bank, but testified he was making some assumption from Unsell's comments. Another assistant State's Attorney testified that the State was aware that Karen McGarvey had testified before the grand jury that when she took the cards and letters to Meyer's office, Meyer told her that he would probably place the correspondence in a safe-deposit box.

A few days after the conversation at the Edwardsville tavern, the State's Attorney's office attempted to determine the precise location of the cards and letters. A police officer called a bank in Bethalto and was able to obtain information that Meyer had opened a safe-deposit box at the bank in November of 1979, and that there had been no activity regarding the box since it had been opened. The State then obtained a search warrant, and eventually seized the cards and letters from the safe-deposit box.

[5] Defendant first contends that the seizure of the cards and letters from the safe-deposit box violated her right against self-incrimination under the fifth amendment to the United States Constitution (U.S.Const., amend. V). Defendant's argument is without merit. She was not compelled to write these cards and letters. The United States Supreme Court in *Andresen v. Maryland* (1976), 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627, addressed a similar argument and concluded there was no fifth amendment violation. The court stated:

> "[I]n this case, petitioner was not asked to say or do anything. The records seized contained statements that petitioner had voluntarily committed to writing. The search for and seizure of these records were conducted by law enforcement personnel. * * * Any compulsion of petitioner to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, was not present." (427 U.S. 463, 473, 96 S.Ct. 2737, 2747, 49 L.Ed.2d 627, 638.)

The court further stated:

> "Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, [citation], a seizure of the same materials by law enforcement officers differs in a crucial respect — the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence." (427 U.S. 463, 473-74, 96 S.Ct. 2737, 2745, 49 L.Ed.2d 627, 638.)

We conclude defendant's fifth amendment rights were not violated.

[6] Defendant also argues that her rights under the fourth amendment to the United States Constitution (U.S.Const.,

amend. IV) were violated by the search of the safe-deposit box. Defendant cites cases from other jurisdictions for the proposition that searches of an attorney's office for a client's documents are unreasonable. We acknowledge the inherent dangers involved when police seek to search an attorney's office. There is a great liklihood in such circumstances that police will discover confidential information that is immune from seizure. (See 2 LaFave Search & Seizure, sec. 4.1(g) (2d Ed.1987).) In the present case, however, we are not faced with a search of an attorney's office. The search here was of a lawyer's safe-deposit box. Police had information that this box had been opened by attorney Meyer shortly after the McGarveys brought him the cards and letters. The State also had information that attorney Meyer had stated he would probably place these documents in a safe-deposit box. The State also had learned from the bank that there had been no activity with regard to this box since it had been opened. Therefore, it was reasonable to believe that there would be little chance that police would discover matters in the box other than the cards and letters. We believe the narrow scope of this search renders it reasonable.

[7] Defendant also argues that her attorneys were coerced into disclosing the location of the cards and letters by threats from lawyers from the State's Attorney's office that the defense lawyers could be faced with criminal prosecution if they concealed these documents. The evidence, however, shows that the State seized the letters by way of a search warrant after calling a bank to determine if attorney Meyer had opened a safe-deposit box there. While there was some testimony that attorney Unsell may have made some reference to a bank during the conversation at the tavern in Edwardsville, he did not disclose to the State in which bank the documents were located. Moreover, the uncontradicted evidence at the suppression hearing demonstrated that it was common knowledge that attorney Meyer had possession of the cards and letters and that the State knew he would likely place them in a safe-deposit box. The evidence supports a conclusion that defendant's attorneys did

not reveal the location of the documents and the evidence thus supports the trial court's denial of defendant's motion to suppress.

[8] Defendant also argues that the issuance of the search warrant was contrary to the law of the case as established by an earlier order of the trial court. The court had ruled against the State's motion for production of the cards and letters. Defendant argues this was in effect a suppression order, and that the State should have appealed the order pursuant to Supreme Court Rule 604(a)(1) (87 Ill.2d R. 604(a)(1)), and because the State did not, the ruling became the law of the case. We do not agree that the court's ruling was a suppression order. The court did not prohibit the State from seizing the documents by means of a search warrant, but merely refused to order the defense to turn them over to the State.

In summary, we have found no reason to disturb the trial court's denial of defendant's motion to suppress the cards and letters seized pursuant to the search warrant from t' safe-deposit box.

Defendant next contends the court erroneously denied her the opportunity to cross-examine defense witness William Gill. Prior to Gill's testimony, the court ruled that defendant would not be able to impeach Gill about the fact he had been convicted of voluntary manslaughter in the death of Stephen Davidson. The State offered to allow defendant to impeach Gill by telling the jury he had been convicted in connection with the death of Stephen Davidson without informing the jury of the specific crime for which he was convicted, but defendant refused this offer.

Defendant contends that under Supreme Court Rule 238(a) (87 Ill.2d R.238(a)), she was entitled to impeach Gill with his prior conviction even though he was her primary defense witness. Rule 238(a) provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him."

Defendant argues this rule gave her an absolute right to impeach Gill. The State argues that defendant had no reason to impeach Gill because she wanted the jury to believe all of Gill's testimony, and that the reason defendant wanted to introduce evidence of Gill's conviction for voluntary manslaughter was to persuade the jury that defendant should not be convicted of murder because Gill was convicted of a lesser charge.

[9] It is clear that the fact Gill was convicted of voluntary manslaughter and not murder is not relevant to the issue of defendant's guilt for murder. Section 5-3 of the Criminal Code (Ill.Rev.Stat.1979, ch. 38, par. 5-3) states: "A person who is legally accountable for the conduct of an offense may be convicted upon proof that the offense was committed and that he was so accountable, although the other person claimed to have committed the offense has not been prosecuted or convicted, or has been convicted of a different offense or degree of offense, or is not amenable to justice, or has been acquitted." Therefore, Gill's conviction for voluntary manslaughter cannot be used as substantive evidence to exonerate defendant. There is no question, however, that defendant should be able to impeach her own witnesses. We also do not doubt her right to impeach her witnesses by informing the jury of the prior conviction of a witness. We find any error here, however, not to require reversal. Defendant has failed to explain why she would want to impeach Gill's testimony. It appears clear her reason for desiring to place Gill's conviction for voluntary manslaughter before the jury was to persuade the jurors that she should not be convicted of murder. Had she desired to impeach Gill, or to make an anticipatory disclosure of the conviction, she should have accepted the State's offer to allow her to tell the jury he had been convicted in the case without naming the specific offense.

Defendant next argues the conspiracy and solicitation counts of the information were defective and that the State failed to prove these two offenses. We need not address these arguments because, for the reasons which follow, defendant's conviction for conspiracy and solicitation must be vacated.

[10] Section 8-5 of the Criminal Code of 1961 (Ill.Rev.Stat.1979, ch. 38, par. 8-5) provides: "No person shall be convicted of both the inchoate and the principle offense." The committee comments to section 8-5 clearly state that this provision applies to conspiracy and solicitation. (Ill.Ann.Stat., ch. 38, par. 8-5, Committee Comments, at 579 (Smith-Hurd 1972).) Our supreme court, in *People v. Hill* (1980), 78 Ill.2d 465, 476, 36 Ill.Dec. 676, 681, 401 N.E.2d 517, 522, held that this statute requires that a conviction for conspiracy to commit murder must be vacated where the defendant has also been convicted of murder. Under *Hill,* defendant's conspiracy conviction in the present case must be vacated.

[11] We also believe the plain language of section 8-5 mandates that we vacate defendant's conviction and sentence for solicitation. We acknowledge that in *People v. Columbo* (1983), 118 Ill.App.3d 882, 984-85, 74 Ill.Dec. 304, 377-78, 455 N.E.2d 733, 806-07, *cert. denied* (1984), 467 U.S. 1208, 104 S.Ct. 2394, 81 L.Ed.2d 351, the court held that section 8-5 does not prohibit convictions for both solicitation and murder. That decision relied upon the supreme court's decision in *People v. Hairston* (1970), 46 Ill.2d 348, 263 N.E.2d 840, *cert. denied* (1971), 402 U.S. 972, 91 S.Ct. 1658, 29 L.Ed.2d 136. In *Hairston,* the defendant was charged under the theory of accountability with murder and attempted murder, and was also charged with soliciting another person to commit the principal crimes. A jury found defendant not guilty of murder and attempted murder, but guilty of solicitation. Defendant claimed on appeal that the crime of solicitation merges with the principal offense if the latter offense is in fact committed, and that therefore his acquittal on the murder and attempted murder charges operated as a bar to his conviction of solicitation. The supreme court stated: "Having specifically spelled out that solicitation is a separate and distinct crime, punishable and triable as such, the legislature could not have intended that a merger with the principal crimes would be effected as defendant contends." 46 Ill.2d 348, 357, 262 N.E.2d 840, 846-47.

We cannot agree with *Columbo* that *Hairston* allows for convictions of both murder and solicitation to commit murder. The supreme court was simply rejecting the defendant's argument that an acquittal on a murder charge precluded a conviction for solicitation. The court did not hold that a person can be convicted of both murder and solicitation, but in fact cited the language of the committee comments that conviction for both violate the statute. The *Columbo* court's reliance on *People v. King* (1977), 66 Ill.2d 551, 6 Ill.Dec. 891, 363 N.E.2d 838, *cert. denied* (1977), 434 U.S. 894, 98 S.Ct. 272, 54 L.Ed.2d 181, is also misplaced. *King* did not address the clear language of section 8-5 regarding inchoate offenses. Therefore, we conclude defendant's conviction and sentence for solicitation must also be vacated.

Next defendant argues the court erred in admitting into evidence handwriting exemplars executed by defendant. These exemplars were relied upon by the State's handwriting expert, Arthur Anthony, who testified that the handwriting on some of the letters was that of defendant, and that the handwriting on others was "probably prepared" by defendant. On cross-examination regarding the exemplars written by defendant, Anthony conceded that it was not good practice to instruct an individual on how to space the words in an exemplar. The evidence showed defendant had been instructed on which words from the questioned letters to write on the exemplars and how to space the words. Defendant contends for this reason the exemplars should not have been admitted or relied upon by Anthony.

[12] The method in which the exemplars were prepared goes to the weight to be given this evidence, not its admissibility. We note than Anthony testified that while it was not good practice to instruct an individual on how to space the words on an exemplar, he also testified that the fact this was done here would not affect his opinion. Moreover, any error here would have to be deemed harmless because there was other competent

evidence that defendant authored the questioned cards and letters. (See *People v. McNichols* (1986), 139 Ill.App.3d 947, 956, 94 Ill.Dec. 375, 382, 487 N.E.2d 1252, 1259.) In addition to circumstantial evidence presented by the State showing defendant had written this correspondence, the McGarveys testified that defendant acknowledged the existence of the correspondence. Furthermore, Gill himself testified that the letters found in his apartment were written to him by defendant. In addition, some of the most incriminating statements made in the correspondence were within letters typewritten by defendant, thus requiring no handwriting identification. Gill testified the defendant had sent him these typewritten letters. For these reasons, we find no reversible error in the admission of the exemplars.

Defendant's final argument is that the court erred in admitting evidence that Gill showed police the location of the alleged murder weapon. Madison County sheriff's deputy Jerry Knight testified that Gill was present on November 1, 1979, with Knight and other police officers on the banks of the Mississippi River. Knight testified that Gill picked up a rock and threw it into the river and that a gun was found in the river at the location where the rock went into the water. Defendant argues this evidence constituted inadmissible hearsay and should have been excluded.

[13] Defendant has waived this issue on appeal because she failed to object at trial when Knight testified (see *People v. Stewart* (1984), 105 Ill.2d 22, 56, 85 Ill.Dec. 241, 258, 473 N.E.2d 840, 857, *cert. denied* (1985), 471 U.S. 1131, 105 S.Ct. 2666, 86 L.Ed.2d 283), and failed to include this issue in her post-trial motion. (See *People v. Wright* (1985), 111 Ill.2d 128, 148, 95 Ill.Dec. 787, 794, 490 N.E.2d 640, 647, *cert. denied* (1987), ____ U.S. ____, 107 S.Ct. 1327, 94 L.Ed.2d 179.) Furthermore, we cannot conclude any error here rises to the level of plain error because this evidence was cumulative of other evidence properly admitted. (See *People v. McNichols*, 139 Ill.App.3d 947, 956, 94 Ill.Dec. 375, 382, 487 N.E.2d 1252,

1259.) The State's evidence established the gun found in the river as being the murder weapon. Robert McGarvey testified for the State that this gun appeared to be the one owned by William Gill. Moreover, Gill himself testified in direct testimony for the defense that he had his gun at the Davidson residence, that shots were fired from this gun, and that after the incident at the Davidson home he threw the gun into the river. Thus, we find no reversible error in the admission of Knight's testimony that Gill threw a rock into the river at the location of the gun.

For the foregoing reasons, defendant's conviction for conspiracy is vacated; defendant's conviction and sentence for solicitation are vacated; and defendant's conviction and sentence for murder are affirmed.

Vacated in part, affirmed in part.

KARNS, P.J., and KASSERMAN, J., concur.

APPENDIX 16

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

December 22, 1987

Mr. G. Edward Moorman
Williamson, Webster, Groshong, Moorman & Falb
601 E. Third St. Ave.
Alton, IL 620026-2024

No. 66004 - People State of Illinois, respondent, v. Susan E. Davidson, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on January 13, 1988.

APPENDIX 17

No. 66004

IN THE
SUPREME COURT OF ILLINOIS

People of the State of Illinois,
Plaintiff-Appellee,

vs.

Susan E. Davidson,
Defendant-Appellant.

Appeal from the Appellate Court,
Fifth District, State of Illinois

No. 5-85-0211

Original Appeal from the Circuit
Court for the Third Judicial
Circuit, Madison County, Illinois

No. 79-CF-637

Hon. Charles V. Romani, Jr.
Judge Presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Susan E. Davidson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Illinois entered herein on December 22, 1987, denying appellant's Petition for Leave to Appeal to the Supreme Court of the State of Illinois from the order of the Appellate Court of Illinois, Fifth District, entered September 9, 1987, affirming Appellant's conviction.

This appeal is taken pursuant to Title 28, *United States Code,* section 1257(2).

SUSAN E. DAVIDSON

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